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IN THE

Supreme Court of the United States

October Term, 1962.

No. **1012**

FRANK E. LIPP and BETTY FRIEDMAN, Executrix of the Estate of JOSEPH FRIEDMAN, Deceased,
Petitioners,

v.

THE UNITED STATES.

Petition for a Writ of Certiorari to the United States Court of Claims

April 11, 1963.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1963

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IN THE

Supreme Court of the United States

October Term, 1962

No.

FRANK E. LIPP, and BETTY FRIEDMAN, Executrix of the Estate of Joseph Friedman, Deceased,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Frank E. Lipp and Betty Friedman, pray that a writ of certiorari issue to review the judgments of the United States Court of Claims, Washington, D. C., in the above-entitled actions.

Opinions Below

The opinions of the Court below (Appendices A and B, *infra*, A 1, A 51) are reported, respectively, *Lipp v. United States*, at 301 F. 2d 684 (1962), and *Friedman v. United States*, at 310 F. 2d 381 (1962).

Jurisdiction

The opinion of the court below dismissing the petition in *Lipp v. United States*, *supra*, was entered April 4, 1962 (A 1); the order of the court overruling plaintiff's motion for rehearing was entered on November 7, 1962 (A 50); and the order of the court overruling plaintiff's motion for reconsideration was entered on January 11, 1963 (A 50). In *Friedman v. United States*, *supra*, the opinion of the court below dismissing the petition was entered on November 7, 1962 (A 51), and the order of the court overruling plaintiff's motion for rehearing was entered on January 11, 1963 (Appendix B, *infra*, A 92). Under the practice of the United States Court of Claims, there is no formal judgment additional to an opinion dismissing a petition. The jurisdiction of this Court to review decisions of the Court of Claims is invoked under 28 U. S. C. §1255(1). The review of these cases on certiorari to the United States Court of Claims is sought in a single petition pursuant to Rule 23(5), Revised Rules of the Supreme Court of the United States, 28 U. S. C. following §2680.

Question Presented

Whether an action in the United States Court of Claims begun well within the six years following an allegedly arbitrary, capricious and unlawful denial of a claim timely made to a Board for the Correction of Military Records,

established in a service department pursuant to an Act of Congress, 10 U. S. C. §1552 (A 95), and over which claim the said Correction Board has exercised jurisdiction, is barred by limitations, 28 U. S. C. §2501 (A 95), simply because more than six years have elapsed between the initial occurrence of the events with which the claim is concerned and the commencement of the suit in the Court of Claims.

Statutes Involved

The statutes involved, 5 U. S. C. 1009, 10 U. S. C. §1552 and 28 U. S. C. §2501, are set forth in Appendix C, *infra* (A 94).

Statement of the Case

Both petitioner Lipp and Joseph Friedman, deceased husband of petitioner Betty Friedman, were non-Regular medical officers of the Army of the United States who served on extended active duty with the Army during World War II. Both were in good health when they entered upon such duty. Both incurred disabling physical defects while serving, and incident to their extended active service. Both were relieved from active duty, not for physical disability, and neither of them has received any retirement pay or benefits as provided by law for service members who become incapacitated for active duty in line of duty, and incident to their active duty.

Joseph Friedman, prior to his relief from active duty, met a number of medical boards and retiring boards, all of which found him unfit for general service and one of which recommended his retirement. The last retiring board, however, found him "not permanently incapacitated for active duty at [that] time" and recommended his re-

examination and revaluation after six months (A 51). For reasons which cannot now be established, this was not done (A 52).

In Lipp's case, the petitioner suffered from multiple sclerosis, an incurable disease of the nervous system which is characterized by periods of exacerbation and remission. He exhibited symptoms while on active duty which, in retrospect, were attributable to multiple sclerosis but at the time were not correctly diagnosed. His trouble was not definitely identified until some two years after his relief from duty (A 15, 25). When his infirmity was discovered, he requested, but was refused, permission to appear before an Army Retiring Board to determine his entitlement to retired pay (A 18).

Applications were made on behalf of both men, Lipp by himself, and Joseph Friedman by his widow and executrix, Betty Friedman, to the Army Board for Correction of Military Records asking for correction of their respective records to reflect their retirement for physical disability and consequent entitlement to retirement pay and benefits. The Board denied both applications. Each petitioner thereupon filed suit in the United States Court of Claims claiming the retirement pay which they had been denied, alleging that such denial, on the part of the Correction Board, was arbitrary, capricious and unlawful. Each suit was filed within six years after the alleged arbitrary and capricious action on the part of the Correction Board, pursuant to the statute limiting actions in the Court of Claims to those filed within six years after the claim has accrued. 28 U. S. C. §2501. The court below, however, held that both were time-barred, petitioner Friedman's having accrued in 1946 or 1947 (A 88), and petitioner Lipp's upon the refusal of the Department of the Army to grant him an appearance before a Retiring Board in 1950 (A 5). Both petitions in the court below were there-

fore dismissed on the ground that the alleged arbitrary, capricious and unlawful actions on the part of the Army Board for Correction of Military Records did not give rise to a cause of action cognizable by the Court of Claims and that any cause of action petitioners might have was barred by limitations (A 5, 53).

Reasons for Granting the Writ

1. The decisions of the court below, holding the petitioners' claims to be barred by limitations, are not only in direct conflict with a doctrine long established by this Court, but with a multitude of its own holdings. A generation ago, this Court clearly stated the principle that, in the absence of compelling language to the contrary in the statute which creates a right, the Court may and will review the acts of the officer administering the statute, when such acts are arbitrary, capricious, or not according to the evidence. *Dismuke v. United States*, 297 U. S. 167, 172 (1936), and cases cited therein. In the instant case, there is no language in the statute denying judicial review and vesting final discretion in the Secretaries of the service departments (A 95).[1] Moreover, there is clear and compelling legislative history to support the petitioners' contention that Congress intended the decisions of the Correction Boards to be subject to review by the courts. *Friedman v. United States*, 141 C. Cls. 239, 258 (1958), and pages 12-13, *infra*.

The court below, in its opinion in petitioner Friedman's case noted that "briefs in pending cases and motions for rehearing or reconsideration strongly suggest that there are large uncertainties and inconsistencies in our past decisions." *Betty Friedman, Executrix, v. United States*, *supra* (A 53). Petitioners can only comment

[1] Such language, though once suggested to the Congress, was intentionally stricken from the bill. 82d Congress, 1st Session, House of Representatives Report No. 449. Pp. 12-13, *infra*.

that, in the decade since pay cases arising in the Departmental Boards for Correction of Military and Naval Records have been reaching the Court of Claims in volume, it has been squarely held by that court in at least nine cases that an allegation of arbitrary, capricious and unlawful action on the part of the Correction Boards gives rise to a fresh cause of action. *Knight v. United States*, C. Cls. No. 64-60 (decided January 18, 1961); *Weiner v. United States*, 148 C. Cls. 445 (1960); *Allin v. United States*, 147 C. Cls. 459 (1959); *Eicks v. United States*, 145 C. Cls. 522 (1959); *Friedman v. United States*, 141 C. Cls. 239 (1958); *Patterson v. United States*, 141 C. Cls. 435 (1958); *Proper v. United States*, 139 C. Cls. 511 (1957); *Suter v. United States*, 139 C. Cls. 466 (1957), cert. den. 355 U. S. 926; *Furlong v. United States*, 138 C. Cls. 843 (1957).

The doctrine has been clearly enunciated in dicta in at least as many more opinions of the court below: *Frederick v. United States*, C. Cls. No. 111-56 (decided July 15, 1960); *Caddington v. United States*, 147 C. Cls. 629 (1959); *San Millan v. United States*, 139 C. Cls. 485 (1957); *Girault v. United States*, 133 C. Cls. 135 (1956); *Odell v. United States*, 134 C. Cls. 634 (1956); *Wales v. United States*, 132 C. Cls. 765 (1955); *Rosnick v. United States*, 132 C. Cls. 1 (1955); *Gordon v. United States*, 129 C. Cls. 270 (1954); *Uhley v. United States*, 128 C. Cls. 608 (1954).

In *Eicks v. United States, supra*, at p. 526, Mr. Justice Reed (Ret.), sitting by designation in holding that the action was not barred by limitations, said, "This suit seeks recovery of salary for periods more than six years prior to its institution but the right to recover is not set up as a salary debt but arises, it is claimed, from the arbitrary and capricious action of the Secretary of the Navy in refusing correction of plaintiff's record." In *Knight v. United States*, C. Cls. No. 64-60, January 18, 1961, Madden, J., speaking for the unanimous court, denied

the government's motion to dismiss the petition as barred by limitations, by reference to the court's earlier decision in a similar case in these terms:

> "In *Furlong v. United States*, 138 Ct. Cl. 843, 845, the court cited seven cases and then said:
>
> The principle of these cases is, first, jurisdiction is conferred by Congress, not on this court, but on retiring boards and the Secretaries of the three armed services, to decide an officer's right to retirement for physical disability, and his consequent right to retired pay; second, it follows therefrom that we cannot acquire jurisdiction of such a claim until after the Board and the Secretary have acted, or failed or refused to act, and not then unless the board and the Secretary acted arbitrarily or capriciously or contrary to law; third, since our jurisdiction could not be invoked until after the retiring board and the Secretary had acted, the statute of limitations on a suit in this court did not begin to run until they had acted; fourth, on a finding of arbitrary or otherwise unlawful action by the retiring board and Secretary, it is our duty to act in the place of the retiring board and, on a finding of disability at the time of discharge, to hold an officer is entitled to retired pay from the date of his discharge.
>
> Since the decision of *Furlong*, the case of *Propes v. United States*, 139 Ct. Cl. 511; *Friedman v. United States*, 141 Ct. Cl. 239; *Patterson v. United States*, 141 Ct. Cl. 435; and *Allin v. United States*, No. 504-55, decided November 4, 1959, have been decided by this court. They all are in accord with what was said in *Furlong, supra*."

Clearly, petitioners submit, the decisions of the court below of which certiorari is sought herein are in conflict with the whole body of law heretofore established, not only by the decisions of this court, but by those of the court below. In these premises, petitioners respectfully submit that this court should resolve the conflict.

2. The decisions for which certiorari is sought, if permitted to stand, will cause severe, unwarranted and unjust harm to the plaintiffs in the Court of Claims who have filed their petitions and, in some instances, assumed the expensive burden of trial in reliance on the series of contrary holdings by that court. As this court said over a century ago, there are no cases where an adherence to the maxim of *stare decisis* is so absolutely essential to the peace of society as those which affect retroactively the jurisdiction of courts. *Maryland v. The Baltimore and Ohio Railroad Co.*, 16 How. 314, 325 (1853). Petitioners submit that to deny hearing of their cases to these litigants below on the grounds of a suddenly raised bar of limitations, which did not exist before and is unjustified now, is equally unconscionable.

At least 25 plaintiffs who are, in respect of limitations, situated similarly to petitioners herein have begun actions in the court below, only to go aground on the new barrier reef erected by the decisions below in these petitioners' cases.[2] Six of them have already borne the costs of trial before Commissioners of the Court. *Walters v. United States*, C. Cls. No. 313-59; *Robinson v. United States*, C. Cls. No. 433-59; *Hellner v. United States*, C. Cls. No. 15-60; *Levadi v. United States*, C. Cls. No. 260-60; *Woodward v. United States*, C. Cls. No. 190-60; *Knight v. United States*, C. Cls. No. 64-60.

Petitioners submit that this is an intolerable injury to be inflicted on litigants whose only lapse has been that they relied on the law as the court below had heretofore clearly and emphatically stated it to be.

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[2] See Appendix D, *infra*. The office of the Clerk of the Court has informally indicated that all of the cases listed in Appendix D are presently suspended until 30 days after final action on the instant petition. Many other such cases, petitioners are advised and believe, are suspended, formally or informally, before various Commissioners of the Court.

3. The issue is one of major public importance. More than 16,000,000 of our citizens served in our last major war, between 1941 and 1946.[4] Prior to 1946, corrections in military and naval records could be made only when authorized by a private bill enacted by Congress.[5] In order to obviate the consideration of a substantial number of such bills subsequent to World War II, Section 207 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 837) provided for the correction of military and naval records by boards of civilian officers or employees of the respective service departments.[6] By 1951, such boards established in the Army, Navy and Air Force had received a total of approximately 15,000 requests for a correction of record.[7] In 1962, there was a total of 2,806,062 men and women on active duty in the armed forces.[8] It may fairly be assumed that the necessity for resort to the correction boards will continue to arise in the same proportion and for the same causes as in the past. Of the 15,000 applications for correction of records filed between 1946 and 1951, the only period for which statistics are available, between 1300 and 1400, or less than 10 per cent, were granted relief.[9] It is not suggested that such statistics have any evidentiary value with respect to the fairness with which the boards dealt with the unsuccessful applicants. It is, however, submitted that a rejection rate of over 90 per cent creates a sufficient space for the intrusion of human error to warrant judicial review in instances wherein arbitrary, capricious or unlawful abuse

[4] World Almanac, 1963, p. 735.

[5] 82d Congress, 1st Session, Senate Report No. 788, p. 1.

[6] *Ibid.*

[7] 82d Congress, 1st Session, House of Representatives Report No. 449, p. 2.

[8] World Almanac, 1963, pp. 725, 726.

[9] Full Committee Hearing on H.R. 1181, House of Representatives, Committee on Armed Services, May 15, 1951 [No. 21], p. 446.

of discretion on the part of the boards is alleged. *Dismuke v. United States, supra.* The legislative history of the 1951 amendment to the Legislative Reorganization Act (10 U. S. C. §1552, A 95) shows clearly, as will be demonstrated hereinafter, that the Congress intended that the right to judicial review should be available to applicants to the boards. In justice to the millions of men and women, past, present and future, who serve the country in military status, the anomalous and highly confused state into which the decisions of the court below have thrown the law ought to be resolved. *Betty Friedman, Executrix, v. United States, supra* (A 53).[9]

4. Petitioners submit that the Congress, in enacting the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. §1009 (A 94) insured their right to a judicial review of arbitrary, capricious or unlawful action by the Board for the Correction of Military Records. Notwithstanding, although petitioner Friedman pleaded her right to review of her case under the said Act to the court below (*Plaintiff's Reply to Defendant's Suggestion of Bar by the Statute of Limitations*, p. 11) the court either took no cognizance of the issue, or decided it *sub silentio*. The question of the applicability of the Act to decisions of Correction Boards is an important issue in need of the guideposts which a decision of this Court would erect.

5. The issue herein is also of substantial public importance in that the Boards for Correction of Military and Naval Records are the administrative tribunals of last resort for the more than a million men and women on active duty with the armed services, plus the multitude of others in the reserve components who can be similarly affected.[10] A careful search does not disclose a prior instance in which this court has established the

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[9] See pp. 15-21, *infra*.

[10] World Almanac, 1963, p. 734.

guide lines for what shall constitute due process of law with respect to the right of judicial review of the cases of such persons who allege that they have been dealt with arbitrarily, capriciously or unlawfully by the Boards, or the Secretaries of the several service Departments acting through the Boards.

Argument

All military organizations have two responsible internal functions, discipline and administration. Discipline, when necessary, is enforced by the punitive statutes. Most servicemen and women, like the great majority of the population, have little contact or concern with them. But administration, with particular respect to their pay and allowances, is a constant, daily factor in their lives from the moment they don the uniform.

In the conduct of affairs of such magnitude and complexity, there are bound to be errors made and injustices done, no matter how well meaning the administrators. Traditionally, under our governmental system, rectification of such mistakes has been accomplished by acts of Congress for the private relief of the injured persons. At the end of World War II, the burden of such bills on the Congress became substantial.[1] In consequence there was included in the Legislative Reorganization Act of 1946 a provision for the establishment of the Boards for the Correction of Military Records in the several service departments.[2] The statute, in substance, authorized the Secretaries, acting through boards of civilian officers, to correct a military or naval record whenever such action was deemed necessary to correct an error or remove an injustice.[3]

[1] 82d Congress, 1st Session, Senate Report No. 788, p. 1.

[2] Section 207, Act of August 2, 1946, 60 Stat. 812, 837.

[3] *Ibid.*

The effort on Congress' part was well-intentioned but did not prove very fruitful. Shortly after the Boards were established the Comptroller General rendered an opinion[14] to the effect that "neither Section 207 nor other legislation vests in the heads of the specified departments or in this Office any authority to * * * use appropriated funds to pay any claim for money, based on correction made in the military or naval records of an individual under the authority of that section." Congress thereupon proceeded, in 1951, to amend the Act to provide the needed authority.[15] During the hearings on the proposed amendment, it was brought clearly and unmistakably to the attention of the subcommittee of the House of Representatives that certain agencies of the government, the General Accounting Office as well as the service departments, would have preferred that the act, as amended, should specifically preclude review of Correction Board decisions by the courts. The committee's rejection of the suggestion was emphatic. The following is a typical passage:[16]

> "Mr. Doyle: I never like to see the right of the court to review any board abrogated, whatever the board is.
>
> Mr. Baier [representing the Department of Defense]: I think that provision is to prevent a lot of these little cases from going to court and wasting the court's time where the Department has the record and they try to assemble the data.
>
> Mr. Clemente: Unfortunately the word was 'wasting a court's time.' I don't think it is properly put because the courts are there for that specific reason.
>
> Mr. Baier: I will take that back. It will save the court's time, not waste it, sir.

[14] 27 Comp. Gen. 709 (1948).

[15] Act of October 25, 1951, 65 Stat. 655, 10 U.S.C. §1552.

[16] Hearings Before a Subcommittee of the House Committee on Armed Services on H.R. 1181, 82d Cong., 1st Session, pp. 376, 392.

[17] *Ibid.* p. 392.

> Mr. Doyle: I may observe from a quarter of a century of a law practice before the court that fraud is pretty difficult to prove and which you say, except when procured by means of fraud, you are practically eliminating an applicant making a meritorious 'showing' before a Federal court. If there is going to be any wording, I certainly favor the inclusion of 'mistake' on a broader ground, so that at all times the applicants have the right, if they have the money, to go before a court and protect their rights.
>
> And the fact that you have reconsidered cases where there has been supplementary evidence in itself shows that there might well be many cases which might well go before the courts."

In its Report, the full Committee on Armed Services merely stated:[*]

> "On page 3, lines 11 and 12, the committee has deleted the words 'including a review by the courts of the United States' since it is of the opinion that the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances."

It would scarcely seem necessary to belabor this point to such an extent since the court below, in its comprehensive and thoroughly well-reasoned opinion in *Friedman v. United States*, 141 C. Cls. 239, 259 (1958), seemed to have settled the question, if any existed, as to the intent of Congress in these terms:

> "We conclude that Congress had no intention, in enacting the correction board legislation, of withholding from this court jurisdiction to render a money judgment for pay of which a claimant is deprived by reason of the arbitrary or illegal action of a correction board * * *"

Notwithstanding, the court below, in an appendix attached to its opinion in the case of petitioner Friedman,

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[*] 82d Congress, 1st Session, House of Representatives, Report No. 449, p. 3.

now purports to question even its own prior conclusion in this respect. In the premises, petitioners herein can only quote Mr. Justice Reed (Ret.), sitting by designation, as he spoke for the court below in *Eicks v. United States, supra:*

> "It would overturn much of our thinking on justice to say that those words were intended to bar courts from awarding pay to military personnel when they had been deprived of their compensation by failure to correct their service record through arbitrary and capricious action."

Petitioners respectfully submit that the contrary view appears to them more like a somersault than an overturn.[19]

In any event, once the 1951 amendment to the Correction Board statute became law, cases began in due course to arrive before the court below for review. The first appears to have been *Uhley v. United States*, 128 C. Cls. 608 (1954). The plaintiff had been discharged from the Air Force on December 24, 1945, without retirement pay. On May 16, 1952, soon after the effective date of the amendment, but more than six years after his discharge, he applied to the Air Force Board for Correction of Military Records for a correction of his record to reflect his retirement for physical disability. His application was denied on January 2, 1953, and he filed his petition in the court below in February, 1953, alleging that the denial by the Board was arbitrary and capricious. The government moved to dismiss on the ground that the suit was barred by limitations. The court, in overruling the motion, said:

> "Although the alleged error in plaintiff's mititary record was committed, if at all, at the time of plaintiff's separation from the service in 1945, the wrong of which plaintiff here complains and for which he seeks judicial redress, is not the alleged

[19] Or even a judicial flip-flop. See Washington Post, April 17, 1962, p. A-16.

> error *per se*, but the alleged arbitrary and capricious deprivation of the right, conferred by the Act of October 25, 1951, to the action 'necessary to correct an error or remove injustice.' Under these circumstances we are of the opinion that the suit is not barred by the statute of limitation."

On the same day, the court decided *Gordon v. United States*, 129 C. Cls. 270, 277 (1954), by dismissing plaintiff's petition. The court said, however, that the plaintiff had by application thereto invoked the jurisdiction of the Correction Board and *in the absence of arbitrary or capricious action by the Board* he was bound by its terms. The following year, the court wrote in *Rosnick v. United States*, 132 C. Cls. 1, 5 (1955), while dismissing the petition, "that in certain cases in which a manifest injustice has been done the action of the Army Board for Correction of Military Records might serve as a basis for the court to correct such an injustice." The following month, May, 1955, in *Wales v. United States*, 132 C. Cls. 765, 771, the court said:

> "Therefore, in the absence of a clear showing that the Board acted arbitrarily or capriciously and therefore unlawfully, we will not disturb its findings. *Gordon v. United States*, 129 C. Cls. 270. However, the doors of this court are always open to grant relief to a party aggrieved by the action of an executive or administrative officer which is arbitrary or capricious. *Carlin v. United States*, 121 C. Cls. 643. The Supreme Court has long recognized the right of the court to review such action. *Dismuke v. United States*, 297 U. S. 167."

As late as November, 1955, the court below still adhered to the doctrine of *Dismuke v. United States, supra*. In dismissing the petition in *Girault v. United States*, 133 C. Cls. 135, 144, the court said "resort to the court can only be had if the Secretary's action is arbitrary or unlawful. As soon as it appears the Secretary is acting in such a manner, the officer can appeal to the court for redress."

In four cases decided in late 1955 and early 1956, the court, in dismissing the petitions, did so on the ground that resort to the Correction Board was permissive and did not toll the statute of limitations. In none of the four was the question of a new cause of action arising from arbitrary and capricious action by the Board discussed. *Duff v. United States*, 133 C. Cls. 161 (1955); *MacFarlane v. United States*, 134 C. Cls. 755 (1956); *Barker v. United States*, 135 C. Cls. 42 (1956), cert. den. 352 U. S. 935 (1956), reh. den. 352 U. S. 976 (1957); *Soukaras v. United States*, 135 C. Cls. 88 (1956). *Capps v. United States*, 133 C. Cls. 811 (1956), is something of an anomaly since action by the Correction Board was not involved. In principle, however, the court's rationale is in harmony with the present petitioners' contention. In *Capps*, the court held for the plaintiff that his cause of action accrued in 1951 upon the erroneous action of the Discharge Review Board, and not at the time of his discharge from service in 1944 as the government argued. The court cited *Uhley*, *supra*.

Beginning again in late 1956, the court adverted to its *Uhley* position that arbitrary and capricious action by the Correction Board gave rise to a new cause of action. *Furlong v. United States*, 138 C. Cls. 843 (June 1958, overruling the decision of December 5, 1956) stood for the principle enunciated in *Uhley*, that a petition was timely if filed within six years of the time of arbitrary or capricious action by the Secretary or a board. By 1957, the court's doctrine in this field apparently was firmly established. The government contended that the actions in *San Millan v. United States*, 139 C. Cls. 485 (1957); *Suter v. United States*, 139 C. Cls. 466 (1957), cert. den. 355 U. S. 926; *Proper v. United States*, 139 C. Cls. 511 (1957); *Friedman v. United States*, 141 C. Cls. 239 (1958), and *Patterson v. United States*, 141 C. Cls. 435 (1958), all were barred by the statute of limitations.[20] Each plaintiff

[20] See also *Buford S. Kirtley v. United States*, C. Cls. No. 93-55 (defendant's motion to dismiss on the ground of limitations overruled by order July 12, 1957).

had filed a petition in the court alleging arbitrary and capricious action by the Correction Board within six years of such action, but more than six years after his discharge from service not for physical disability. All were suits for disability retirement pay. The court's pronouncements on the matter of limitations were these:

Suter (holding):

> "* * * Our decision is that the plaintiff, when he was released from the Army in 1946, had a total and permanent service-connected disability. If the Physical Evaluation Board in 1951, or the Board for the Correction of Military Records in 1954 had so decided, and the decision had been officially approved, the plaintiff would have received his retired pay from the date of his release in 1946. Since his cause of action is based upon the failure of the first of those tribunals to decide his case at all, or upon the failure of the second to decide the case upon the evidence, we must decide the case as we think they should have decided it, and with like effect."

San Millan (dicta):

> "* * * it has long been held that this court has jurisdiction to render judgment for the pay which was denied the claimant by the arbitrary or capricious actions of the administrative agency of the Government. *Dismuke v. United States*, 297 U. S. 167; *Uhley v. United States*, 137 C. Cls. 275; *Gordon v. United States*, 129 C. Cls. 270; *Suter v. United States*, decided this day, *ante*, p. 466."

Proper (holding):

> "* * * As we said in our recent decision in the case of *John A. Furlong v. United States*, 138 C. Cls. 843, this court acquired jurisdiction of a claim for disability retired pay
>
> * * * after the * * * Secretary * * * acted, or failed or refused to act * * * arbitrarily or capriciously or contrary to law; * * *.

"Accordingly, we hold that plaintiff's claim based on the alleged arbitrary action of the Secretary of the Army is not barred by the statute of limitations."

Friedman (holding):

"In a number of recent decisions by this court it has been held that a cause of action for disability retired pay accrues when the Secretary or a Correction Board arbitrarily, capriciously and contrary to law denies such application. *Furlong v. United States*, 138 C. Cls. 843; *San Millan v. United States*, 139 C. Cls. 485; *Proper v. United States*, 139 C. Cls. 511. This event in plaintiff's case took place in 1954. We are of the opinion that whether plaintiff's cause of action accrued in 1952 when the Air Force erroneously failed to retire him according to the findings and recommendation of the Physical Evaluation Board, or in 1954 when the Correction Board denied his application, his claim is not barred by the statute of limitations."

Patterson (holding):

"With respect to the defendant's contention that the plaintiff's claim is barred by the six-year statute of limitations, this court has held that where a plaintiff has received no determination of his eligibility for disability retirement pay by any board until the correction board has acted, his cause of action accrues not at the time of his separation from the service, but at the time of the alleged wrongful action of the correction board, approved by the Secretary, in wrongfully refusing to correct the records and grant the plaintiff disability retirement with pay. *Uhlen v. United States*, 128 C. Cls. 608; *Furlong v. United States*, 138 C. Cls. 843; *Proper v. United States*, 139 C. Cls. 511; *Friedman v. United States*, *supra*; *Suter v. United States*, *supra*. Accordingly, we conclude that the claim stated herein is not barred by the statute of limitations."

Finally, in *Ficks v. United States*, 145 C. Cls. 522 (1959), through Mr. Justice Reed, sitting by designation, the court stated the doctrine fully and, it was thought, once and for all. (Judge Laramore dissented for other reasons.) The court said:

> "The Government pleads this court's six-year statute of limitation as a bar to any recovery for the period between plaintiff's retirement and September 30, 1949. It has not briefed its position. This suit was filed December 2, 1955. The notice of the Board that it had been determined that no change, correction or modification would be made on plaintiff's July 12, 1954, application reached plaintiff October 18, 1955. This suit seeks recovery of salary for periods more than six years prior to its institution, but the right to recover is not set up as a salary debt but arises, it is claimed, from the arbitrary and capricious action of the Secretary of the Navy in refusing correction of plaintiff's record. Under the earliest provision for the correction of military records, 60 Stat. 837, 1207, there was no express limitation as to when the Board proceeding should be begun. In the 1951 amendment, a member of the armed forces had three years after discovery of the error or injustice, or ten years after the enactment of the amendment, 'whichever be later,' to bring proceedings before the Board. 65 Stat. 655. This was the act in effect when plaintiff filed his request for correction before the Board. At present the limiting time is three years after discovery of the injustice or October 26, 1961, 'whichever is later.' The Board, since 65 Stat. 655, may excuse a failure to file in time in the interest of justice. We think this present cause of action arose on the refusal of the Board, after the Secretary's disapproval, to correct plaintiff's record. It was therefore in time.
>
> It is within the jurisdiction of this court to correct the action of the Board if it results from the Secretary's arbitrary disapproval of the Board's decision and recommendation. If the contentions

> of plaintiff are correct, he is entitled to back pay from the United States of over $5,000. This action seeks the recovery of that amount and the right to recover depends on whether the refusal to correct the record was arbitrary. *Friedman v. United States*, n. 4, *supra*, at 255, and cases cited, particularly *Furlong v. United States*, 138 C. Cls. 843. In the *Friedman* case this court pointed out the legislative history that governed our interpretation of the congressional purpose to allow this court to enter judgment for pay withheld by an arbitrary failure to correct a military record, but not to compel 'alteration or correction of an official military record.' Page 258. When Congress said that rulings of Correction Boards should 'be final and conclusive on all officers of the Government except when procured by means of fraud' (65 Stat. 655), it would overturn much of our thinking on justice to say that those words were intended to bar courts from awarding pay to military personnel when they had been deprived of their compensation by failure to correct their service record through arbitrary and capricious action. The correction boards were created to remedy wrongs, not to confound them."

The principle had become so well established that in *Allin v. United States*, 147 C. Cls. 459 (1959), the unanimous court, in giving plaintiff judgment in 1959 for disability retirement pay back to 1946 based on arbitrary and capricious action by a Correction Board in 1954, did not even mention the statute of limitations in its opinion. In *Weiner v. United States*, 148 C. Cls. 445 (1960), Judge Laramore in writing again for the unanimous court,[21] gave judgment in 1960 for disability retired pay back to the date of plaintiff's release from duty in

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[21] Judge Laramore made this comment, however (fn. 3, p. 10 of the slip opinion):

> "The writer of this opinion dissented in the *Suter* case for the reason that plaintiff's claim accrued when he was separated from the Army and hence was barred by the 6-year statute of limitations. Since the majority of the court is of the opinion that the 6-year limitation statute has no applicability in a situation such as presented here, no useful purpose would be served by pursuing this course."

1946, based upon an allegation of arbitrary and capricious action by a Correction Board in 1956, ten years later. In *Frederick v. United States*, C. Cls. No. 111-56, decided July 15, 1960, the Court adhered to the established doctrine, although recovery was limited to pay due for the period of six years prior to the filing of the petition. Judges Whitaker and Laramore dissented. Judge Whitaker, however, stated that "In all of these cases, the question for our determination is whether or not the action of the Secretary is arbitrary or capricious or not supported by substantial evidence."

Finally the court below came to *Knight v. United States*, C. Cls. No. 64-60, which has been discussed to some extent above.[22] In this case, the unanimous court would appear to have stated its position in the clearest, most unequivocal and definitive terms at its command:

> "The Government's motion is based entirely upon the statute of limitations. It raises no other issue. The contention is that the plaintiff's cause of action, if he has one, accrued at the time of his release from active duty in 1947; that that occurred more than six years before he filed his petition in this court, *ergo*, the claim is barred by limitation.
>
> This contention assumes that Congress, in enacting in 1946 and amending in 1951 the statute authorizing the establishment of boards for the correction of military records, intended to create no legal rights but merely to lodge an arbitrary uncontrolled power in the Secretaries to correct records or refuse to correct records as they happened to feel like doing.
>
> The assumption is not sound. That kind of raw power uncontrolled by law could only be conferred by the most express and emphatic language. We have repeatedly held that the Secretaries and their boards for the correction of records must base their decisions upon substantial evidence, and are not privileged to make arbitrary and capricious decisions."

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[22] See p. 7, *supra*.

Notwithstanding, the court below has now abandoned that position for no apparent reason. As demonstrated above, the attempt by the court in petitioner *Friedman's* case to rationalize its shift does not accord with either the facts or the law. In *Lipp, supra*, the court's holding is that resort to the Correction Boards is merely permissive and such resort does not toll the limiting statute, something which was never in issue. The opinion in *Friedman, supra*, is squarely to the contrary, holding, apparently, that resort to *some* board will activate the statute, whether a Correction Board or a Retiring Board.

To perplex the situation beyond repair, the court below, on the same day, allowed recovery in *Harper v. United States*, C. Cls. No. 206-59, decided November 7, 1962, although 15 years had elapsed between the beginning of the period for which he was granted retirement pay and the institution of his suit, the only intervening board having been the Correction Board which had denied his application a year before the filing of his petition.[23]

Petitioners submit that, amidst such confusion, all that can be fairly said is that the real issue upon which this petition turns is simply whether or not the members of the Armed Forces have the right, upon an arbitrary and capricious action by a Correction Board, to the judicial review of such an action that Congress intended to provide, and which is in accord with the doctrine long established by this court and followed, hitherto, by a multitude of cases in the same court to which certiorari is sought.

Petitioners submit that they, in company with the millions of other men and women in uniform, have the right to such review by due process of law. Military forces depend upon morale fully as much as upon equipment and training. Nothing can be more destructive of that morale, and more foreign to our concept of justice, than the derogation of this fundamental right.

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[23] See, also, the apparent holding in *Friedman, supra*, that resort to the Correction Board is *mandatory* in some instances. A 68.

Conclusion

For the foregoing reasons, this petition for certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Of Counsel

Appendix A

IN THE UNITED STATES COURT OF CLAIMS

No. 384-58

(Decided April 4, 1962)

FRANK E. LIPP v. THE UNITED STATES

Guy Emery for plaintiff. *Emery and Wood* on the briefs.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General William H. Orrick, Jr.*, for defendant.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, a former Reserve officer of the Army, brings this action to recover retired pay which he claims is due him by reason of the arbitrary, capricious and unlawful action of the Army Board for Correction of Military Records in refusing, on October 1, 1955, to correct his record of military service to show his retention on active duty until January 30, 1946, and his retirement for physical disability as of that date.

The facts are fully found and will be referred to only to the extent necessary to this opinion.

The United States makes a strong contention that plaintiff's claim is barred by the 6-year statute of limitations, 28 U. S. C. §2501. It says that plaintiff was released to

inactive duty on January 26, 1946, and his petition was not filed in this court until August 22, 1958. As a matter of fact, plaintiff was released to inactive duty on January 26, 1946. During his military service, plaintiff never sought to be examined and surveyed for physical disability, nor did he ever request an opportunity to appear before an Army disposition board or an Army retiring board.

In this posture plaintiff is basing his present claim on the alleged arbitrary and capricious action of the Army Board for Correction of Military Records, which denied each of plaintiff's applications on October 10, 1952, and October 31, 1955, respectively.

This court has held many times that the statute of limitations is not tolled unless suit is brought under an act *requiring* a prior administrative determination, as a condition of suit. *Mistretta v. United States*, 128 Ct. Cl. 41; *MacFarlane v. United States*, 134 Ct. Cl. 755; *Cuiffo v. United States*, 131 Ct. Cl. 60; *Schmeichel v. United States*, 134 Ct. Cl. 809; *Barker v. United States*, 135 Ct. Cl. 42, cert. denied 352 U. S. 935, 976; *Levadi v. United States*, 137 Ct. Cl. 97, cert. denied 353 U. S. 917; *Conlin v. United States*, 137 Ct. Cl. 128, cert. denied 353 U. S. 916; *Price v. United States*, 137 Ct. Cl. 685; *Hutchinson v. United States*, 137 Ct. Cl. 889.

For example, the Board of Contract Appeals is an administrative agency. The board is authorized to decide questions of fact but not of law. Consequently, this court has held many times that, under the terms of the contract, an aggrieved party must appeal to the board on questions of fact. However, since the board has no power to pass on questions of law, this court has held, in this type of case, that the aggrieved party need not appeal to the board, but can immediately file suit.

There is no requirement that as a prerequisite to suit a person must first exhaust an administrative remedy by

application to the Army Board for Correction of Military Records. See *Ogden v. Zuckert, infra.* If the officer had requested action by a retiring board and this request had been denied, and if the Army was wrong in releasing an officer to inactive duty not for reasons physical, when in fact the officer was actually disabled as a consequence of his military service, a cause of action would immediately accrue and suit could be immediately filed. That is when the action first accrued within the meaning of the limitations statute and that is when the statute of limitations would normally begin to run. *Girault v. United States,* 133 Ct. Cl. 135, 144.

Moreover, under our earlier decisions, the fact that administrative proceedings were pursued by application and denial by the correction board gave no comfort to plaintiff. *L. E. Myers Co., Inc., v. United States,* 105 Ct. Cl. 459; *Carlisle v. United States,* 29 Ct. Cl. 414; *Battelle and Evans v. United States,* 7 Ct. Cl. 297; *Curtis v. United States,* 34 Ct. Cl. 1; *Cohen, Goldman & Co., Inc., v. United States,* 77 Ct. Cl. 713, 730, cert. denied 290 U. S. 681; *Love v. United States,* 122 Ct. Cl. 144; *Tan, et al., v. United States,* 122 Ct. Cl. 662, 664, cert. denied 344 U. S. 895; *Gray v. United States,* 124 Ct. Cl. 313; *McMahon v. United States,* 342 U. S. 25; *Soriano v. United States,* 352 U. S. 270.

True, this court has somewhat retreated from this position in recent years. For example, in *Knight v. United States,* No. 64-60, decided January 18, 1961, the court unanimously concurred with Judge Madden that the 6-year statute of limitations did not begin to run until after denial by the correction board.

However, in the light of the recent decision by the Court of Appeals for the District of Columbia Circuit, we are constrained to re-examine our decisions. The Court of Appeals for the District of Columbia Circuit in the case of *William B. Ogden, Appellant, v. Eugene M. Zuckert,*

Secretary of the Air Force, Appellee, Case No. 16283, in a decision dated December 14, 1961, held that resort to the correction board was not mandatory and jurisdiction of the court was not precluded by the omission of plaintiff to seek relief through the board.

After a re-examination of the decisions of this court, and in view of the above decision of the Court of Appeals, we conclude that our former decisions were correct when we held that resort to the correction board was a permissive remedy only. Since it was not mandatory, we were correct in our holdings that the statute of limitations is not tolled until correction board action and, further, that the pendency of said administrative proceedings does not suspend the statute of limitations while the claim is being considered by said administrative agency. *Levine v. United States,* 133 Ct. Cl. 774; *Rosnick v. United States,* 132 Ct. Cl. 1; *Girault v. United States, supra; Duff v. United States,* 133 Ct. Cl. 161; *Odell v. United States,* 134 Ct. Cl. 634. To the extent of this opinion, all decisions in conflict therewith are expressly overruled.

In the case at bar, the plaintiff did not request an opportunity to appear before an Army retiring board or an Army disposition board during his military service. However, plaintiff did request that he be permitted to appear before a "medical retirement board," by letter dated December 19, 1948. This request was denied on December 30, 1948. Again, by letter dated May 26, 1949, plaintiff requested the Adjutant General that he be permitted to appear before an Army retiring board. This request was denied by letter from the Adjutant General dated July 18, 1949. Plaintiff again wrote the Adjutant General on June 16, 1950, requesting "appearance and medical retirement before an Army retiring board." On July 13, 1950, the Adjutant General responded that his appearance before a physical evaluation board (formerly Army retiring board) to establish his entitlement to phys-

ical disability retirement pay benefits was not warranted and that his request was not favorably considered.

Thus assuming under the facts of this case, without deciding the question, that appearance before a retiring board or physical evaluation board may be requested after an officer has been released,[1] plaintiff's instant cause of action is still barred by the statute of limitations, since the last request for appearance was denied on July 13, 1950, and his petition was not filed in this court until August 22, 1958.[2]

In conclusion, the latest date favorable to plaintiff is July 13, 1950, when he was denied retirement board proceedings. His petition was filed on August 22, 1958, more than six years thereafter and is barred by the statute of limitations, *supra*. Accordingly, plaintiff's petition will be dismissed.

It is so ordered.

DURFEE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Robert K. McConnaughey, and the briefs and argument of counsel, makes findings of fact as follows:

I. The plaintiff resides at Omaha, Nebraska. He graduated from the School of Medicine of Creighton Uni-

[1] While it is questionable that an officer could accrue a cause of action by a request for retirement board proceedings after his release to inactive duty, it is not necessary at this time to decide the question inasmuch as by giving plaintiff the benefit of the last request, his petition here was not timely filed.

[2] In *Girault v. United States*, *supra*, it was held that "All of these boards, * * * act only in an advisory capacity to the Secretary of War. If his decision on the retirement rights of an officer is alleged to have been arbitrary, then the officers right to come to the court for redress accrues as soon as the arbitrary decision is rendered."

versity in Omaha, in 1934. On July 30, 1934, he was appointed first lieutenant, Medical Corps, Officers' Reserve Corps and performed active service with the Civilian Conservation Corps from August 9, 1934, to July 1, 1935. He was reappointed first lieutenant, Medical Corps, Officers' Reserve Corps, on July 30, 1939, and entered upon extended active duty in the Army in that grade on December 9, 1940. While on active duty, he was successively promoted to captain, major, and finally, on January 4, 1946, to lieutenant colonel, Army of the United States, and on December 20, 1946, to lieutenant colonel, Medical Corps, Officers' Reserve Corps. He served overseas in the Pacific theatre from 1942 to 1945, most of the time in New Guinea. On January 26, 1946, he was released from active duty by reason of demobilization, not for physical disability. His commission as lieutenant colonel, Army of the United States, terminated on June 30, 1948, and on December 12, 1952, he was honorably discharged from his commission as lieutenant colonel, Medical Corps, Officers' Reserve Corps.

2. In September, 1939, plaintiff formed a partnership with a Dr. C. J. Manganaro, a Creighton Medical School classmate, for the practice of medicine in Kimball, Nebraska. The new partnership contracted to purchase a hospital in Kimball, thereby incurring heavy financial obligations.

3. On December 9, 1940, plaintiff was ordered to active duty with the United States Army under his commission in the Officers' Reserve Corps. He had not requested active duty and the orders were issued without regard to his consent, voluntary or otherwise. Having been married only a relatively short time, having a new son about 6 months old, and having only recently formed his medical partnership and begun practice, he was reluctant to enter the military service in peacetime but was not aware of

any valid basis for avoidance of the orders placing him on active duty.

4. On December 10, 1940, plaintiff was physically examined by a board of medical officers and found to be in sound physical condition in every respect. He was found to be physically qualified for active service except for a deficiency of a quarter of an inch in height, which was waived. The report of this examination listed no neurological symptoms, nor any history of such symptoms.

5. On the morning of January 10, 1941, plaintiff, upon awakening, found the muscles of the right side of his face in spasm and felt numbness in his left arm and leg. After examination by Captain A. E. Montgomery, the Post Surgeon, at Fort Des Moines, and consultation with other Army medical officers, plaintiff was referred to Dr. Frank A. Ely, a specialist in neurology in Des Moines, Iowa. Dr. Ely diagnosed plaintiff's illness as Bell's Palsy which he attributed to anxiety and exposure to draught. After further consultation with Captain Montgomery and other Army medical officers, and because of the marked asymmetry of plaintiff's face, he was referred to Dr. Walter D. Abbott, another specialist in neurology, in Des Moines, Iowa.

6. Upon examination by Dr. Abbott, and in reply to Dr. Abbott's questions, plaintiff gave Dr. Abbott a history that included a severe stomach upset, which plaintiff attributed to some canned artichokes he ate shortly after his assignment to Fort Des Moines. Plaintiff later recalled that upon being questioned by Dr. Abbott as to whether he could recall a "pricking" sensation, he had informed Dr. Abbott that at the time his first child was born, in 1940, he had felt a tingling in his face, as if it were frozen or had "gone to sleep," which sensation quickly disappeared when he saw his healthy and normal

son and his wife speedily recovered. According to plaintiff's recollection several years later, the "tingling" involved no facial paralysis, no unsteadiness, no involvement of vision, and neither in location, nature, persisteney, or effect was that sensation similar to the facial spasm which had caused plaintiff to seek treatment by Dr. Abbott.

7. Plaintiff also later recalled that he informed Dr. Abbott, at this time, that sometime during the fall of 1939, soon after his move to Kimball, Nebraska, he thought he had noticed some unsteadiness of gait but that the unsteadiness disappeared when a refractive error in his eyeglasses was corrected.

Dr. Abbott's report, submitted to plaintiff in 1948, which is quoted in finding 19 and which purports to be a copy of Dr. Abbott's report to Captain A. E. Montgomery on January 15, 1941, places the unsteadiness at the same time as the facial tingling in June of 1940, and, in contrast to plaintiff's generalized recollection merely of a tingling sensation of the face, specifically describes the area covered by the pricking sensation as "over the entire distribution of the right trigeminal nerve."

8. On March 11, 1941, plaintiff was hospitalized at Fort Des Moines, Iowa, for "gastro-enteritis, acute, catarrhal, cause undetermined," and on March 12, 1941, was discharged to duty as cured.

9. In May 1942, plaintiff was transferred from Fort Des Moines overseas to the Southwest Pacific theatre of operations. He was stationed initially in Australia. In 1943, he was attached to the 15th Portable Surgical Hospital at Oro Bay, New Guinea, with which he remained until September 1944. The living and working conditions imposed upon all personnel attached to this unit were most strenuous. All lived and worked in tents. The nearest general hospital was in Melbourne, Australia. The

15th Portable Hospital at Oro Bay received and processed both Army and Navy casualties from various islands and combat areas. Hours were long and the volume of work at times permitted neither rest nor relaxation. The pressure and tension of a steady procession of casualties was unrelenting. There were repeated alerts, air raid warnings, and occasional enemy attacks. There was much rain and dampness. Food was canned. There were no fresh vegetables and the only fresh fruit available was bananas and coconuts, occasionally obtained from the natives. During his 16 months on New Guinea, plaintiff suffered five malarial attacks which he treated himself. His vision deteriorated steadily from 20/40, right eye, and 20/30, left eye, uncorrected, at the time of his entry on active duty, to a bilateral rating of 20/200 in May 1945. Throughout the period of his overseas service, plaintiff continued to have recurrences of fatigue, unsteadiness, and fibrillary twitchings, none of which were officially reported. Plaintiff attributes his failure to report and seek treatment for these complaints primarily to the fact that he was involved in war which, at the time and place, had reached its most critical stage. He was in an area of heavy casualty where doctors were urgently needed. Moreover, he had been professionally advised, and believed, that his symptoms were merely nervous in origin and could be alleviated with supplementary vitamin intake, which he maintained.

10. On March 18, 1945, upon his return to the United States, plaintiff was assigned to the performance of medical duties at Hoff General Hospital, Santa Barbara, California, where he remained until July 30, 1945. He was then assigned to Fort Lewis, Washington, where he performed eye, ear, nose, and throat work until his release to inactive duty on January 26, 1946.

11. Plaintiff's physical examination for release from active duty, dated September 17, 1945, showed defects of astigmatism, myopia, compound, bilateral, with vision uncorrected 20/200 and corrected 20/20; and flat feet, 2 degrees.

12. During his military service, plaintiff never sought to be examined and surveyed for physical disability, nor did he ever request the opportunity to appear before an Army Disposition Board or an Army Retiring Board. At the time of his release from active duty on January 26, 1946, he thought he was in pretty good health and felt that he was physically fit to perform active duty. Indeed, he did perform certain duties in the Army Reserves from January 26, 1946, the date of his release from active duty, to December 12, 1952, the date of his honorable discharge from his commission as a lieutenant colonel, Medical Reserve Corps.

13. Upon plaintiff's release from active duty January 26, 1946, he took a residency at a hospital in New York, and pursued a course of study of ophthalmology.

14. (a) By application dated February 21, 1946, plaintiff filed a claim with the Veterans' Administration. His application, which contained no mention of the episodes subsequently diagnosed as possibly indicative of multiple sclerosis, contained the following statements:

> 32. *Nature of disease or injury on account of which claim is made and date each began.*
>
> Malaria—August 1943
> Dental Caries—1941
> Epidermophytosis—December 1943
> Papillomas—August 1944.
>
> 33. *If you received any treatment while in the service, give name, number or location of hospital.*

first-aid station, dressing station or infirmary, or the organization to which it was attached, the dates of treatment, and nature of sickness, disease, or injury.

August 1943, APO 503, Headquarters Base B, attacks of malaria, self-treated.

December 1943, 362 Station Hospital, APO 503, hospitalized 1 week, treated for epidermophytosis.

1945, APO 927, Headquarters Base 7, fillings in teeth.

1941, Ft. Des Moines, Iowa; 1 extraction.

This application included the parenthetical remark "(Since claimant is Doctor, treated self)."

(b) By rating, dated May 9, 1956, the Veterans' Administration made the following determination:

No Percent (0%) from 1-27-46
MALARIA ON HISTORY
No Percent (0%) from 1-27-46
PES PLANUS, BILAT., NON SYMPTOMATIC
MM-EPIDERMOPHYTOSIS, HANDS & FEET
Not found on last examination of service records.
nn-PAPILLOMAS—Claimed by the veteran, not shown by the evidence of record.

15. By letter dated March 17, 1946, plaintiff inquired of the Department of the Army about an appointment in the Regular Army. In reply, the Adjutant General informed plaintiff that March 1, 1946, had been the deadline set for receiving applications in the Regular Army, and that applications received after that date (as plaintiff's had been) would not be considered.

16. On September 2, 1946, plaintiff was admitted to Kings County Hospital, Brooklyn, New York, as a patient because of a severe attack of dizziness, nausea, vomiting,

diplopia, loss of balance, prostration, nystagmus on upward gaze, and adiodokokinesis. He was released from the hospital on October 4, 1946, but his diplopia and other symptoms persisted for about 10 weeks. The hospital's diagnosis, as subsequently reported to the Veterans' Administration, was "Probably acute encephalitis but story of Fell's Plasy [sic] 6 years ago with blurred vision suggests Devic's Disease (atypical Multiple sclerosis)."

17. In the summer of 1948, and again in December 1948, plaintiff suffered a recurrence of loss of equilibrium, numbness from the waist down, girdle pains, and diplopia. On June 14, 1948, he was examined by Dr. J. F. Gardiner, Omaha, Nebraska, who reached a tentative diagnosis of multiple sclerosis. On July 21, 1948, he was examined in consultation by Dr. Wilbur A. Muehlig, Omaha, Nebraska, a specialist in neurology. Dr. Muehlig's diagnostic impression was multiple sclerosis.

18. On the same date, July 21, 1948, Dr. Muehlig also examined plaintiff for compensation by the Veterans' Administration. In his report to the Veterans' Administration, Dr. Muehlig's discussion and diagnosis were as follows:

> DISCUSSION: Diagnosis of multiple sclerosis must be made largely from the history. While the objective findings at present are not sufficient to make this diagnosis, in connection with the past history it seems most likely that it is the proper diagnosis. It is likely that the episode considered to be a possible encephalitis in 1946 was actually part of the chronic illness.
>
> CERTIFICATION OF DIAGNOSIS: I believe this patient has multiple sclerosis and that the previous episode considered to be encephalitis was actually a part of this illness, basing this on the present findings and on the past history as given.

19. On September 7, 1948, Dr. Walter D. Abbott furnished plaintiff with the following statement, a copy of which, subscribed and sworn to before a notary, plaintiff sent to the Veterans' Administration on September 14, 1948:

TO WHOM IT MAY CONCERN:

This is a copy of my report to Captain A. E. Montgomery on January 15, 1941.

Lieutenant Frank Lipp complains of a facial spasm on the right since June of 1940. He informed me that his father died at the age of 69 of carcinoma of the lung; the mother was living and well. He had two brothers and three sisters living and well and one brother died in infancy. A maternal uncle died of tuberculosis and his maternal grandmother died of diabetes. He has been married two and one-half years and has one child living and well, and his wife is living and well. He admits to moderate indulgence in coffee and tobacco. He underwent a tonsillectomy in 1917 and an appendectomy in 1929. He states that in June, right after his baby was born, he was very concerned about his wife because she went through an extremely difficult labor. He noted paresthesias, such as pricking sensations over the entire distribution of the right trigeminal nerve and also some unsteadiness which was corrected by a change in a refractive error. The paresthesias gradually subsided and in December when he was called into Service he noted paresthesias over the left side of the face and at that time underwent a negative neurological examination in Omaha. These subsided, but about a week ago he developed a spasm of the muscles around the right eye and angle of the right mouth and he feels that there is some

asymmetry of the face. He also has noted an occasional unmbness [sic] of the left arm and leg. He has been well otherwise except for a recent gastrointestinal upset after eating canned artichokes.

My examination revealed a well developed and nourished male of 30. Height 5 feet 2½ inches. Weight 140 pounds. There is a spasm of the right facial muscles particularly the orbicularis oculi and orbicularis oris on the right. The left nasolabial fold is not as deep but there is no definite weakness of the facial muscles on either side. The teeth appear normal and the tonsils have been cleanly removed. Examination of the heart, lungs, abdomen, genitalia and rectum is negative, with the exception of a healed scar in the right lower quadrant of the abdomen. Examination of the nervous system otherwise is objectively negative. Blood pressure 112/84. Pulse 76. Temperature 98.6 degrees.

Because there was no nystagmus, change in the speech or absence of abdominal reflexes and because this was worse when he became tired or upset, I did not feel that this was a multiple sclerosis. Although the optic fundi revealed a slight pallor of the temporal margins of the discs, this is in keeping with a patient suffering from myopia which he does to a moderate degree. I did not feel that we could make a diagnosis of an organic neurological condition but rather was of the opinion that this was a fatigue manifestation and suggested the administration of rather large doses of vitamin B and more rest and recreation would correct this condition. .

The mixed use of both the present and the past tense in Dr. Abbott's statement of September 7, 1948, and

especially the manner in which the past tense is used in the last paragraph, suggests that part at least of this statement may have been a reconstruction, based on his January 15, 1941, report, or on his notes, made at the time of the earlier report, rather than a direct quotation of its text.

20. Complete unanimity of the expert evidence supports the conclusion that, in the light of plaintiff's subsequent medical history, Dr. Abbott was in error in rejecting, in January 1941, the diagnosis of multiple sclerosis. The evidence available to him then was far from conclusive, and he evidently shared an understandable reluctance, common among doctors, to reach a diagnosis of multiple sclerosis on the basis of vagrant symptoms, consistent with the existence of the disease, but potentially attributable to other, less ominous, causes. The expert testimony for both parties, however, based upon a cumulation of more recent evidence with that originally available to Dr. Abbott, indicates no dissent from the view that the plaintiff was suffering from multiple sclerosis on January 10, 1941.

21. Taking into account the whole record, it appears that in some respects Dr. Abbott's statement submitted to the plaintiff on September 7, 1948, reflects certain errors in his record, or in his recollection or understanding of the plaintiff's medical history during 1939 and 1940.

(a) It is by no means clear that plaintiff's facial paraesthesias, which occurred in June of 1940, were, as reported by Dr. Abbott, contemporaneous with his reported "unsteadiness" which disappeared after a change of eyeglasses. Plaintiff's recollection, as expressed in his affidavit, placed the "unsteadiness" in 1939 and, on the whole of the evidence, it appears more likely that the two symptoms of tingling and unsteadiness did not occur contemporaneously, as Dr. Abbott's statement in 1948 appears to indicate.

(b) The composite force of the pertinent evidence strongly suggests that Dr. Abbott was in error in stating:

> (1) that plaintiff's complaint of a facial spasm on the right had persisted "since June of 1940," and
>
> (2) that plaintiff had noted paraesthesias over the left side of his face when he was called into active service in December 1940, and that he underwent a negative neurological examination at that time.

The only examination he had then was the medical examination given him on December 10, in connection with his induction into active service. There is no indication that this involved such particular attention to neurological factors as would warrant describing it as a neurological examination, or that he mentioned to the examining doctor any facial spasm on the right or any paraesthesias of the face. The circumstances indicate that Dr. Abbott had mistakenly attributed to the date of plaintiff's entry on active duty, December 9, 1940, the paraesthesias which, with other symptoms, began on January 10, 1941, immediately before plaintiff's examination by Dr. El and had mistakenly related back to June of 1940 the facial spasm on the right which, also, plaintiff first noticed on January 10, 1941.[3]

In view of plaintiff's lack of enthusiasm for active military duty in December 1940, and his evident awareness of the fact that symptoms such as those Dr. Abbott described might indicate a serious condition that would disqualify him from active service, it is a reasonable conclusion that if he had been currently aware of those symptoms at the

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[3] Dr. Abbott's letter of October 1, 1953, quoted hereafter in finding 27(a) says—

> "however, you did not notice any spasm of the right facial muscles until a week prior to the time you were referred to me."

time of his medical examination on December 10, 1940, he would have called them to the attention of the examiners. In these circumstances, the fact that he apparently did not mention either the facial spasm or paraesthesias of the face to the Army examiners on December 10, 1940, is persuasive evidence that none then existed.

(c) The record leaves some doubt as to whether the description in Dr. Abbott's statement of the facial tingling sensation experienced by plaintiff in June of 1940 as "over the entire distribution of the right trigeminal nerve" does not identify a broader and more precisely defined area than that which plaintiff intended to indicate to Dr. Abbott, in describing the 1940 symptom.

22. On October 4, 1948, the Veterans' Administration reconsidered plaintiff's claim and, at that time, service connection was granted for multiple sclerosis. This condition was evaluated as disabling to a noncompensable degree from date following discharge to September 26, 1946; 10 percent disabling from September 27, 1946, to July 18, 1948; and 30 percent disabling from July 19, 1948.

23. By letter dated December 19, 1948, plaintiff informed the Adjutant General that he was receiving "30% pension" from the Veterans' Administration for multiple sclerosis and requested that he be permitted to appear before a "medical retirement Board." On December 30, 1948, the Adjutant General responded that the policy of the Department of the Army with respect to authorizing an officer to appear before an Army Retiring Board applied only in cases where it was evident from records or from evidence submitted that the officer may have had, at the time of his relief from active duty, a physical defect, permanently incapacitating for active military service, which is incident to his active military service. The plaintiff was informed that any evidence available to him that would appear to justify his appearance before an Army

Retiring Board should be submitted to the Adjutant General for review.

24. (a) By a letter dated May 26, 1949, plaintiff again requested the Adjutant General that he be permitted to appear before an Army Retiring Board.

(b) On July 8, 1949, plaintiff's request was sent to the Surgeon General for recommendation, and on July 11, 1949, the Office of the Surgeon General expressed the following comment:

> 1. Department of the Army records, including correspondence, Army & VA clinical records, and AG 201 file, in the case of Lt. Colonel Frank E. Lipp, O-321[illegible], MC-AUS, have been carefully reviewed in this office.
>
> 2. Defect in question was not considered permanently incapacitating for general military service while on active duty.
>
> 3. Recommended officer not appear before an Army retiring board.
>
> 4. If this former officer is tracing onset of multiple sclerosis to symptoms of Bell's palsy and diplopia reported to have occurred shortly after entering active duty, it would appear that the condition originated prior to entry on active duty.

(c) By letter dated July 18, 1949, the Adjutant General wrote the plaintiff, in part, as follows:

> 1. Reference is made to your letter of 26 May 1949, with inclosures, in regard to your request to appear before an Army retiring board.
>
> 2. Your entire record, including your letter with inclosures, and Army and Veterans Administration clinical records, has been carefully reviewed by competent medical authorities in the Department.

The defect in question was not considered permanently incapacitating for general military service while on active duty. If you are tracing onset of multiple sclerosis to symptoms of Bell's palsy and diplopia reported to have occurred shortly after entering active duty, it would appear that the condition originated prior to entry on active duty. Under the circumstances, your appearance before an Army retiring board is not warranted and your request cannot, therefore, be favorably considered.

3. The fact that you are entitled to compensation on a percentage basis under the general pension laws as administered by the Veterans' Administration does not alter in any way the action taken by the Department of the Army. Veterans' Administration benefits are awarded under different statutes and on a different basis from retirement pay benefits as determined by the Department of the Army.

* * *

25. (a) Plaintiff again wrote the Adjutant General on June 16, 1950, requesting "appearance and Medical retirement before an Army Retiring Board."

(b) On July 13, 1950, the Adjutant General responded that his appearance before a physical evaluation board (formerly, Army Retiring Board) to establish his entitlement to physical disability retirement pay benefits was not warranted and that his request was not favorably considered.

26. (a) On December 1, 1951, plaintiff filed a petition with the Army Board for Correction of Military Records, requesting a correction of his records to show "Disability retirement for Service connected diagnosis of Multiple Sclerosis".

(b) On September 2, 1952, the Army Board for Correction of Military Records requested comment and opinion

from the Surgeon General's Office as to whether plaintiff was eligible for and should have been retired for physical disability on January 26, 1946.

(c) The Surgeon General's Office advised the Army Board for Correction of Military Records on September 8, 1952, that the "Evidence of record indicates that on 26 January 1946, under the laws, regulations and policies in effect at that time, Frank R. [sic] Lipp did not have any condition of sufficient extent to have warranted his retirement for physical disability."

(d) On October 10, 1952, the Adjutant General advised plaintiff as follows:

> I have been requested by the Army Board on Correction of Military Records to make further reply to your request for a correction of your Army records.
>
> A thorough examination of your military records, together with the information submitted by you fails to disclose any evidence of error or injustice relative to your separation from active service not by reason of physical disability.
>
> The administrative procedures established by the Secretary of the Army for the guidance of the Army Board on Correction of Military Records provide that an application for a hearing by the board may be denied where a sufficient basis for review has not been established.
>
> I regret to advise you that careful consideration by the Army Board on Correction of Military Records of your Army records, together with such facts as have been presented by you fails to establish sufficient basis for a hearing of your case by the board. Therefore, in the absence of additional material evidence, no further action on your application is contemplated.

27. (a) On March 15, 1954, plaintiff filed an application with the Army Board for Correction of Military Records requesting correction of his records in the following particulars:

> That my present illness be judged service connected, that my honorable discharge be amended to include medical retirement.
>
> The record now fails to show my present illness, and that it became manifest while in service, and that this illness is always a reason for medical retirement.

Attached to plaintiff's application was a statement, signed by the plaintiff, which asserted, in part, that he was a patient at Kings County Hospital, Brooklyn, New York, from September 27, 1946, to October 4, 1946. Plaintiff enclosed statements of two physicians who first examined him and made a diagnosis of multiple sclerosis in 1948 and 1949 (Dr. Wilbur A. Muehlig and Dr. J. F. Gardiner). Plaintiff also enclosed the affidavit of Dr. Walter D. Abbott, dated September 7, 1948, quoted in full in finding 19, and the following two letters from Dr. Abbott, addressed to the plaintiff:

> MAY 19, 1953.
>
> DEAR DR. LIPP: On Januar 13, 1941, I examined you because of facial spasm on the right, involving the upper and lower branches of the seventh nerve and fatigue syndrome. It was noted in your examination that there was some pallor of the optic disc.
>
> At that time I did not feel that you were suffering from multiple sclerosis, but was of the opinion that this could have been an early symptom.
>
> Sincerely yours
>
> WALTER D. ABBOTT, *M.D.*

A 22

October 1, 1953.

Dear Doctor Lipp: I have carefully reviewed my history obtained from you when you were referred to me by Captain Montgomery in January of 1941, at which time you gave a history of some paresthesias of the face in June of 1940 right after your baby was born, your wife had a very difficult time and you were very worried about her at this time; however, you did not notice any spasm of the right facial muscles until a week prior to the time you were referred to me. I felt that this was a blepharospasm on the right as the result of fatigue, and although the question of multiple sclerosis was considered at that time I could not make a definite diagnosis of such.

Please advise me if I may be of further help to you.

Sincerely yours,

Walter D. Abbott, *M.D.*

(b) On May 31, 1955, the Army Board for Correction of Military Records requested the Surgeon General's Office to consider the case furtlær in view of the additional evidence submitted by the plaintiff, and to furnish a detailed comment and opinion covering its review.

(c) On June 3, 1955, the Surgeon General advised the Army Board for Correction of Military Records as follows:

1. Records in the case of Lt. Colonel Frank E. Lipp, O-321285, have been carefully reviewed in conjunction with the psychiatry and neurology consultant to The Surgeon General.

2. A review of all available records indicates a history of transient neurologic symptoms as early at June 1940, (prior to active duty) and January 1941, (after entry).

3. In view of the subsequent diagnosis of multiple sclerosis, it is probable that the transient symptoms in June 1940 and January 1941 and later, were early manifestations of the disease, since this type of history is quite common in multiple sclerosis.

4. The same evidence leading to the opinion that subject had multiple sclerosis prior to separation from active duty leads to the opinion that he had multiple sclerosis prior to service.

5. Multiple sclerosis is disqualifying for entry into military service whether or not it is in remission.

6. It is the opinion of The Surgeon General that Lt. Colonel Lipp had multiple sclerosis prior to entry on active duty and that the condition was not aggravated by military service but due to natural progression.

28. (a) On October 26, 1955, plaintiff appeared and testified at a hearing before the Army Board for Correction of Military Records. The proceedings of the Board disclose that the Board had before it, along with other evidence, the following statements by Dr. Wilbur A. Muehlig and Dr. J. F. Gardiner:

MAY 13, 1949.

(1) ADJUTANT GENERAL,
Washington, D.C.
Re: Lt. Colonel Frank E. Lipp 0-321-285

DEAR SIR: I am writing to you to report my findings on the above mentioned patient, Lt. Colohel Frank E. Lipp, at his request. I first examined this man on July 21, 1948.

CHIEF COMPLAINT: Tingling sensation from the waist down and slight unsteadiness on feet.

HISTORY: In January, 1941, patient had a sudden onset of what seemed to be a left facial weakness resembling Bell's palsy and associated with spasm of the right side of the face. There were also some paresthesias of both sides of the face. This condition cleared up in about six weeks.

In September, 1946, patient had an illness in which there was diplopia, nausea, vomiting, and a spinning sensation associated with a disturbance of balance.

The possibility of encephalitis was considered at that time, although according to the patient there was no increase in the spinal fluid cell count and he had no fever. The symptoms cleared up in about 2½ months.

Two weeks, ago, the patient began to notice a tingling sensation from the waist down bilaterally. He states that his skin felt tight. On two occasions he fell on the stairs, apparently due to the interference with the sensation in his legs and feet. Also during the past two weeks he has noticed a slight tenderness of the skin around his waist off and on. This was burning in nature. There has also been a full feeling at his anus.

Patient states that although he is inclined to worry quite a bit, he believes his nerves have always been under good control.

EXAMINATION: MOTOR FUNCTION: Patient walks rather carefully and less rapidly than normal. He is slightly unsteady on his feet. In standing with his feet together he is fairly steady even with his eyes closed. Strength apparently normal throughout and coordination tests essentially normal except as above.

SENSATION: Sense of motion and position is slightly decreased in the toes bilaterally. Vibratory sense is slightly decreased in the lower extremities. Pain sense seems to be slightly increased from the waist down. Otherwise sensation normal throughout.

REFLEXES: Deep reflexes are equal and normal. No Babinski or Chaddock.

CRANIAL NERVES: Left pupil is slightly larger than right. Optic discs negative and other cranial nerves negative throughout.

DIAGNOSTIC IMPRESSION: Multiple sclerosis.

DISCUSSION: Diagnosis of multiple sclerosis must be made largely from the history. While the objective findings at present are not sufficient to make this diagnosis, in connection with the past history it seems most likely that it is the proper diagnosis. It is likely that the episode considered to be a possible encephalitis in 1946 was actually part of the chronic illness.

MAY 10, 1949. Patient returned for re-examination at this time. He states that during the four or five weeks after he last saw me, his sensation gradually returned to normal, leaving him only with a numb sensation and some tingling on the bottom of his feet. He has continued to have this although does not notice it most of the time.

In December of 1948, the patient developed diplopia which lasted for about three weeks.

During the past 10 days, the patient has had a slight slurring of his speech which has remained about the same since its onset. On examination, the patient is found to have a rather definite slurring and thickening of his speech. He is possibly slightly less

steady in balancing on either foot with his eyes closed than normal and sense of motion and position in the toes is possibly slightly less acute than normal. Otherwise neurological examination negative throughout.

The subsequent course of this case as given in my note of May 10, would tend to verify the diagnosis of multiple sclerosis.

Sincerely yours,

WILBUR A. MUEHLIG, *M.D.*

May 21, 1949.

(2) ADJUTANT GENERAL,
Washington (25), D.C.
Reference: Frank E. Lipp, Lt. Col., M.C. 0-321285.

DEAR SIR: Dr. Frank Lipp, formerly a Lt. Col. in the Medical Corps of the Army of the United States, was examined in my office on June 14th, 1948, five days after the onset of tingling sensations in the legs, thighs and feet. He gave the following history:

He entered extended active duty in the Army of the United States in December, 1940, and a few weeks later developed Bells Palsy, accompanied by mild diplopia. A tentative diagnosis of cerebellopontine angle tumor was entertained by attending medical officers and he was seen in consultation by Dr. Walter D. Abbott of Des Moines. Dr. Abbott's examination was negative for evidence of organic neurological disease and he believed the symptoms due to nervous exhaustion and tension.

Dr. Lipp continued on active duty and in 1945 contracted a malarial infection due to Plasmodium vivax. At the time of his examination he had had nine recurrences of malaria, the most recent in March, 1946. In September, 1946 while a resident at Kings County Hospital in New York, he developed nausea and severe

diplopia which lasted ten weeks. He was seen at that time by several noted specialists in various fields. Final diagnosis, on a purely clinical basis, (and because of previous history) was encephalitis or multiple sclerosis. The spinal fluid was negative on routine examination and also for virus on culture at Rockefeller Center. He had no trouble following that illness. All the tingling of the body and extremities from the waist down developed five days before he present [sic] himself for examination.

There had been no vertigo or staggering but he has been conscious of taking extra precautions against unsteadiness in gait. There have been no sphincteric disturbances but sensation is marked about the anus and genitalia.

The physical examination was not remarkable other than the diminution of vibratory sense in the legs, its absence in the feet, and decreased activity of the abdominal and cremasteric reflexes on the right. The blood pressure was 135 systolic and 78 diastolic. The pulse was full and regular, its rate 80. The oral temperature was 99° F. The hemoglobin content of the blood was normal, the erythrocytes numbered 4.54. The leukocytes numbered 8,900, the differential was normal. The sedimentation rate (Wintrobe) was 12 mm (one hour). The blood serology was negative. The basal metabolic rate was minus 4%. Two voided specimens of urine were negative except for a trace of albumin in the morning sample. Fractional gastric analysis showed normal values for free and combined hydrochloric acid.

It was felt in view of the history, and the positive neurological findings, that clinically, at least, multiple sclerosis was indeed possible if not probable. He was seen in neurological consultation by Dr. Wilber [sic] Muehlig, who concurred in this diagnosis. Dr. Lipp

has remained under observation to the present. In December, 1948, he was incapacitated several days with a recurrence of the nausea and diplopia previously experienced. About the first of May, this year, he noticed inability to enunciate the consonants during conversation. The impression that this represented an exacerbation of the process was confirmed by Dr. Muehlig. Continued observation will be necessary to determine the extent and duration of this recurrence.

In retrospect it would seem that this is certainly a case of multiple sclerosis and that all the episodes since December, 1940, represent but a few of the bizarre and varied symptoms possible in this disease whose protean nature is its outstanding characteristic.

Yours very truly,

J. F. GARDINER, *M.D.*

(b) On October 31, 1955 the Army Board for Correction of Military Records made the following findings, conclusions, and recommendation:

THE BOARD FINDS:

1. That the applicant has exhausted all administrative remedies afforded him by existing law or regulations.

2. That it incorporates and adopts by this reference, so much of the Case Summary, Exhibit "C" above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. that the applicant entered on active duty as a First Lieutenant, Medical Corps, Officers Reserve Corps, on 9 December 1940; that on 15 January 1941 he was referred to Dr. Walter D. Abbott for neuro-

logical consultation; that he informed the doctor that in June 1940, prior to entrance on active duty, he had noted neurological symptoms; that these had subsided but that subsequent to entrance on active duty he had noted further like symptoms; that the examining physician was of the opinion that this was a fatigue manifestation and that he could not make a diagnosis of multiple sclerosis; that he was hospitalized in March 1941 for acute catarrhal gastro-enteritis, in February 1944 for malaria and in August 1944 for a skin eruption; that an ophthalmologic examination in May 1945 showed a diagnosis of astigmatism and conjunctivitis; eye muscle balance showed orthophoria at near; that physical examination for separation noted defects of astigmatism, myopia and flat feet, and found him fit for general military service;

b. that on 3 June 1955 the Surgeon General's Office expressed opinion that there was a history of transient neurologic symptoms prior to entry on active duty and subsequent thereto; that these symptoms were probably early manifestations of multiple sclerosis and led to the conclusion that the disease had its inception prior to entrance on active duty, and was not aggravated by military service; and

c. that the records of the Veterans Administration reflect that the applicant was awarded disability compensation for multiple sclerosis evaluated as non-disabling from the date of separation, 10 per cent disabling from 27 September 1946 to 18 July 1948 and 30 per cent disabling since that date.

THE BOARD CONCLUDES:

1. That in view of the medical evidence of record, it concurs in the opinion of the Surgeon Gen-

eral's Office that the applicant had multiple sclerosis prior to entry on active duty and that the condition was not aggravated by military service.

2. That in view of the foregoing, the applicant's relief from active duty on 26 January 1946, not by reason of physical disability, was not in error or unjust.

THE BOARD RECOMMENDS:

That in the case of FRANK E. LIPP, his application for correction of military records, dated 15 March 1954, be denied.

29. On November 17, 1955, the Assistant Secretary of the Army took the following action in the case:

MEMORANDUM FOR THE ADJUTANT GENERAL:

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records in the case of FRANK E. LIPP, 0 321 285, and under the provisions of Section 207 of the Legislative Reorganization Act of 1946, as amended (Public Law 220, 82d Congress) and General Order 67, dated 10 September 1954, it is directed:

That in the case of FRANK E. LIPP, his application for correction of military records, dated 15 March 1954, be, and hereby is, denied.

30. By letter dated July 10, 1957, Attorney Louis E. Lipp, plaintiff's brother, requested a reconsideration of plaintiff's application for a correction of his military records. The Assistant Secretary of the Army made the following reply to this request on September 13, 1957:

This is in reply to your letter of 10 July 1957 concerning a request for reconsideration of his

application for correction of military records in the case of your brother, Dr. Frank E. Lipp. Dr. Lipp's application requested that his military records be corrected to show he was retired for the physical disability of multiple sclerosis on 26 January 1946, the date of his relief from active duty by reason of demobilization.

In summary the records reflect that Dr. Lipp entered on active duty as a First Lieutenant in the Medical Corps on 9 December 1940 and that a physical examination accomplished the following day did not reflect any conditions, defects or symptoms which might be attributed to multiple sclerosis. Approximately one month after entry into the service Dr. Lipp was referred to a specialist in neurosurgery, one Dr. Walter D. Abbott. Dr. Lipp at that time gave a history of transient neurological symptoms in June 1940, prior to his entrance on active duty, and again in January of 1941.

Dr. Lipp served for nearly three years in the Southwest Pacific area from May 1942 until March 1945 and he was treated during this period for gastroenteritis, malaria and eruption on his face, hands and feet. Prior to his relief from active duty he underwent a physical examination for separation and at that time was found physically fit for general military service.

On 21 February 1946 he filed an application for disability compensation with the Veterans Administration but was found to have no compensable disability. In July 1948 a diagnosis of multiple sclerosis was effected. The Veterans Administration then reconsidered his claim and awarded service connection for multiple sclerosis rated zero per cent disabling from the date of his relief from

active duty until 26 September 1946, 10 per cent from that date to 18 July 1948, and 30 per cent from 19 July 1948.

In 1948 Dr. Lipp requested appearance before an Army Retiring Board. The case was reviewed in the office of the Surgeon General of the Army in 1949 and on three subsequent occasions. In each instance it was felt that the evidence of record indicated that multiple sclerosis had its inception prior to service; that Dr. Lipp had not become incapacitated for active service prior to his relief therefrom and that there had been no abnormal aggravation of the condition while in the service in excess of the normal progression rate.

On 26 October 1955 Dr. Lipp was granted a formal hearing before the Army Board for Correction of Military Records. Dr. Lipp appeared in person before the Board together with his designated counsel and every opportunity was afforded him for a complete presentation of all elements of evidence in support of his contentions. Following full and fair consideration the Board unanimously determined to deny the application.

The Board concluded that in view of the evidence of record, Dr. Lipp had incurred the disease of multiple sclerosis prior to entrance on active duty but that the condition was not aggravated by military service to such a degree as to render him unfit for service prior to his release from active duty. This position was supported by professional opinion from specialists in the field of medicine concerned and was further evidenced by the record of the applicant's physical capacity for discharge of his military duties, the absence of notable symptoms or need for treatment for

his condition while in the service and the evaluation by the Veterans Administration that he did not have a compensable disability at time of relief from active duty.

The recent evidence submitted in support of Dr. Lipp's request for reconsideration of his case consists essentially of a restatement by various physicians and witnesses of the same points raised by Dr. Lipp in his original application and at the formal hearing before the Board. I feel that the material submitted is not of such a nature as to warrant reconvening the Board in formal session for further hearing. This, of course, does not preclude the possibility of further reconsideration of Dr. Lipp's case but such reconsideration must of necessity be based upon new material evidence of such nature and substance that it might reasonably be expected to cause a finding other than that previously effected.

In closing may I state that I was deeply impressed by your presentation and persuasive advocacy on behalf of your brother's case, during my visit with you in New York and in view of the grave affliction from which Dr. Lipp suffers, I felt it necessary to direct an exhaustive review of all facets of the case. However much one's sympathies must lie with a victim of this dread disease, the compelling preponderance of medical evidence and professional opinion has constrained me to come to the above decision.

31. (a) On February 14, 1958, the executive secretary of the Army Board for Correction of Military Records addressed the following communication to the Surgeon General's Office, Physical Standards Division:

1. Reference is made to application filed by Frank E. Lipp wherein he requests that his military records be corrected to show him relieved from active duty on 26 January 1946 by reason of physical disability due to multiple sclerosis.

2. Prior opinions of your office, identified in the attached 201 File under tabs J, K, L and N, have been considered.

3. The case was presented to this Board on 26 October 1955 resulting in a determination to deny the application.

4. In July 1957 the applicant submitted additional evidence for purpose of obtaining reconsideration of his case. On 23 January 1958 the applicant's brother, Attorney Louis E. Lipp, submitted further written argument relative to the contentions of the applicant.

5. It is requested that your office again review the evidence of record to include the material submitted since the hearing before this Board and also the data contained in the applicant's VA Claims Folder, which is currently in the custody of the VA Central Office. It is desired that this Board be furnished an opinion as to whether the added evidence and argument affect the prior determination of your office that the condition of multiple sclerosis was not incapacitating at time of applicant's relief from active duty.

6. It is further requested that the Board be informed as to whether the opinion of the Surgeon General's Office that the presence of multiple sclerosis is not in itself incapacitating for active service, was a matter of professional opinion or whether

this position was supported by regulation policy or other written authority.

7. In the event that your office adheres in the prior opinions rendered, it is requested that this Board be furnished with a detailed explanation upon which to base rebuttal to the specific points raised by Attorney Lipp in his letter to the Board, dated 23 January 1958.

(b) On February 28, 1958, the Office of the Chief, Physical Standards Division, Office of the Surgeon General, advised the Army Correction Board as follows:

1. Records in the case of Frank E. Lipp, 0321285, including the VA claims folder have again been reviewed in this office jointly with:

The Deputy Surgeon General
The Chief, Professional Division, OTSG
The Chief, Neurology and psychiatry consultant, OTSG
The Chief, Physical Standards Division, OTSG

2. The opinion of this office previously expressed on 3 June 1955 is jointly and unanimously reaffirmed that Lt. Colonel Lipp presented symptoms of multiple sclerosis prior to entry on active duty, that the condition was not aggravated by Military service and that he was not eligible for disability retirement benefits at the time of his separation in 1946.

3. Careful review of the records in arriving at this decision points up the decisive importance of the evidence provided by Dr. Walter Abbott in January 1941 and is succintly [sic] summarized in para. 4 of comment #2 this office dated 3 June 1955.

a. If Dr. Abbott's report is to be accepted in its entirety, the evidence is clear that premonitory symptoms of multiple sclerosis existed in 1940.

b. If the evidence provided by that report is to be ignored entirely, there is no recorded evidence that the disease manifested itself during service.

c. If, as recent evidence provided by Dr. Lipp suggests, Dr. Abbott was only partially correct and that the 1940 episode should be ignored but the 1941 event be accepted as significant, the fact that the latter episode occurred 1 month following entry into active service must be considered. The inference that the physiologic responses and pathologic changes precipitating such symptoms developed during this short period as a result of the rigors of military service would be difficult to substantiate on the basis of established medical principles.

4. The testimonial-type letters and statements of physician-friends presented by Dr. Lipp as new evidence attesting to the absence of significant symptoms prior to service do not contribute materially as evidence. In this connection, as pointed out by Wechsler in his Textbook of Clinical Neurology, the occurrence of fleeting mild neurological signs occurring months or years prior to actual onset of the disease and which are frequently overlooked or are considered of no significance is characteristic of this disease.

5. Since the condition under consideration is considered to be EPTS, the question of service aggravation must be recognized. In view of the absence of recorded evidence while in service of significant symptoms subsequent to the January 1941 episode, the negative findings at separation and nature of

the progression of the disease following separation, there would appear to have been no aggravation of the illness while in service. In this consideration, review of the findings of the VA subsequent to separation would tend to confirm this opinion.

6. In compliance with paragraph 7 of comment #1, 11 February 1958, the specific points raised by Attorney Lipp are discussed below.

(1) While it appears to have been established in retrospect that early, premonitory signs of multiple sclerosis existed prior to and during service, the fact of the existence of clinical multiple sclerosis was not established at that time and, in fact, the diagnosis was not made until 1948. There would appear, therefore, to have been no error or injustice in the type of discharge received by Dr. Lipp in 1946. Under the existing circumstances, no other type of discharge would have been warranted by the available facts.

(2) Dr. Lipp was not disqualified for retention in the service by any known regulation at the time of his separation. No retention standards were established by Regulation in 1946; members who were considered to be incapacitated for further service under induction standards were presented to an Army Retiring Board, whose findings were reviewed by the Surgeon General. The final decision rested upon the individual's actual ability to perform the duties of his position. Dr. Lipp was not in fact incapacitated in any respect at separation.

b. Mr. Lipp's para. 2.
While the presumption of soundness upon entry is established by Regulation, it is not believed that it

is the intent of such Regulation to consider such presumption irrefutable or to ignore points of history or evidence of previous illness which were not available to the initial examiner but which come to light at a later date and are considered to be significant on the basis of established medical principles.

c. Mr. Lipp's discussion of Dr. Abbott's report. No detailed comment in regard to this discussion is considered necessary since it simply attempts to completely discredit the unfavorable aspects yet entirely accept the favorable points of the same medical report. In connection with Mr. Lipp's dismissal of the significance of history in his discussion however, it is pointed out that at the earliest stages of development of this disease, history is the most important, often the only means of providing a lead toward recognition of the basic pathology involved. Further, it is noted that the definitive diagnosis of multiple sclerosis in 1948 was admittedly, even at that relatively late date, made chiefly on the basis of history. Dr. Abbott could only have been a dispassionate, objective observer. He could only have obtained and recorded the history from the patient himself who, being a physician, could describe these matters accurately; the symptoms he describes are typical of the premonitory symptomology of multiple sclerosis.

32. (a) Army Regulation 605-10, approved May 26, 1944, and in effect unchanged on January 26, 1946, applicable to commissioned officers in the Army of the United States, provides, in section IV, paragraph 20, of the Physical Standards and Physical Examination portion, that the physical standards for appointment, promotion, entry on active duty, and retention of commission in the Army of

the United States are those prescribed for the Officers' Reserve Corps in AR 40-100 and AR 40-105.

(b) AR 40-105, approved October 14, 1942, and in effect unchanged in pertinent part on January 26, 1946, relates to the standards of physical fitness for a commission in the Regular Army or in the Army of the United States and, in paragraph 52c of section XVIII, which covers Nervous and Mental Disorders, lists multiple sclerosis as a cause for rejection without any qualification whatsoever.

33. (a) AR 40-1025 applies to records and reports of sick and wounded. The stated purpose of such records is to furnish complete personal and diagnostic information on each individual patient. According to the regulation, such information is necessary (among other reasons) in order that data may be available for the conduct of the business of the War Department with particular reference to the retention of the physically fit in service, assignments to duty, adjustments of pay accounts, and the adjudication of claims for compensation or pension. "Army patients" as used in the regulation is defined to include Army personnel under medical treatment or observation, whether in Army or in non Army medical installations and "Army personnel" is defined as including retired officers.

(b) Paragraph 63 of AR 40-1025, which relates to the standards for determining, for the purpose of the records provided for in the regulation, whether a disease was incurred in line of duty, includes, in subparagraph (g), the following provisions:

> g. *Existed prior to individual's current active service and was not aggravated by service (EPTS).*
>
> (2) *Basic provision.*—Irrespective of length of service, an Army patient will be presumed to have been in sound condition upon entering service, un-

less the disease or injury, or the conditions which brought about the disease, injury, or death, were noted on the patient's physical examination upon entrance into the service, or unless clear and unmistakable evidence ((3) below) demonstrates that the injury or disease, or the conditions which caused the disease, injury, or death, though not noted, existed prior to the patient's active service. Further, even if the existence of the condition prior to entering active service has been established, only specific findings of "natural progress" of the disease or injury based on well-established medical principles, are able to overcome the presumption of service-aggravated ((4) below). This provision will serve as a basis for judging line of duty in all cases, on or after 7 December 1941, and before the termination of hostilities incident to the present war. (It will be borne in mind that in determining line of duty with respect to eligibility for retirement benefits, the incapacity, whether resulting from a condition incident to service, or from a condition that existed prior to service but aggravated by the service beyond the "natural progress" of the condition, must be permanent; that is, the incapacity caused by the condition must be such that the removal of the disability within a reasonable time is highly improbable; see AR 605-250 and AR 615-395.)

(3) *Clear and unmistakable evidence.*—Medical judgment alone, as distinguished from well-established medical principles, will not be considered sufficient to rebut the presumption of the patient's sound condition at the time of his entrance into active military service. Discovery of residual conditions, however, such as scars, healed fractures,

absent or resected parts of organs, supernumerary parts, congenital malformations, or fibrosis evidencing formerly active tuberculosis, is convincing enough to impel the conclusion that these conditions existed prior to the patient's entrance into active service, without further proof, provided there is no evidence of active injury or disease during service. Manifestation of lesions or symptoms of chronic disease, so close to the date of the patient's entrance into active service, that the disease could not have originated in so short a period, will be accepted as clear and unmistakable evidence that the disease existed prior to active service. Likewise, manifestation of disease within less than the required minimum incubation period, since the patient's entrance into active service, will be accepted as evidence of inception prior to service.

(4) *Service-aggravated.*—Any increase in disability during active service resulting from a condition that existed prior to active service will be presumed to have been service-aggravated, unless it can be proved otherwise on the bases of well-established medical principles. Medical or surgical treatment furnished during service for preexisting conditions does not of itself establish increase in disability; however, if such treatment was necessitated by increase in severity of preexisting conditions, then such disability will be considered as service aggravated, unless the condition was improved by such treatment. Discovered healed residuals of a former injury or disease, without evidence of active pathology during service, will not be regarded as increase in disability. Similarly, mere recurrences of certain diseases within a short period after the patient's entrance into

active service, such as epileptic seizures, seasonal asthma, recurrent dislocations, etc., do not establish increase in the degree of disability. Also, incapacitating defects due to certain diseases, such as neoplasms, most endocrine disturbances (except hyperthyroidism or diabetes mellitus), epilepsy, arteriosclerosis, and hyperthrophic (degenerative) arthritis, commonly designated as osteoarthritis, and other chronic and degenerative diseases in which the onset is insidious and progress is slow, are of themselves not evidence of increased disability. Unless there was some pertinent local injury, or an abrupt and sudden pathological development during active service, such incapacitating defects may arise as a natural consequence of preexisting conditions, and not incident to or aggravated by service. On the other hand, advancement of such conditions as peptic ulcer, rheumatoid arthritis, diabetes mellitus, active pulmonary tuberculosis, and bronchial asthma (not established as seasonal) can be expected to have been caused by exertion, exposure, or other adverse influence of the military service. Acute infections such as pneumonia, active rheumatic fever (though recurrent), acute pleurisy, acute ear disease, and sudden developments, as hemoptysis, lung collapse, perforating ulcer, decompensating heart disease, coronary occlusion or thrombosis, cerebral hemorrhage, occurring while in service, will be regarded as service-incurred or service-aggravated, unless it can be clearly and unmistakably shown that there was no increase in severity during active service.

34. Technical Manual 12-245, War Department, October 1, 1945, in effect on January 26, 1946, applies to the classification for disposition (including determination of eligibility for retirement benefits) of officers determined to be

physically unfit for general or limited service. It provides in paragraph 60(f), item 28.(3):

> A disease, injury or infirmity which results in a permanent incapacity for active service, as defined in paragraph 60a, and which the retiring board finds to have existed prior to entry on active duty, will be presumed to have been permanently aggravated by military service unless it is established beyond a reasonable doubt that no such permanent aggravation occurred.

35. A summing up of the record in this case discloses multiple sclerosis as an incurable disease, liable to a great variety of diverse manifestations, especially in its early stages, and eventually fatal unless anticipated by some other fatal event before it has run its course.

Its cause is not known. It has no recognized period of latent incubation. Its onset is generally regarded as simultaneous with the appearance of the first physicial symptoms. These are varied, and in themselves subtly ambiguous and inconclusive. More frequently than not they will sustain or assist a diagnosis of multiple sclerosis only when coupled with a subsequent medical history wherein a cumulation of later manifestations lends character, retroactively, to early symptoms which might be attributable to other causes in the absence of the later, more conclusive evidence, and some of which, if the truth could be discovered, might properly be attributable to other cases even though multiple sclerosis becomes clearly evident at a later time.

The course of the disease is highly variable. Infrequently it progresses rapidly. More commonly its advance is slow and intermittent, characterized by a sudden onset of symptoms which may persist or may diminish or disappear through periods of spontaneous remission that may last for years, leaving the patient in some cases with no

current physical evidence that he has the disease, except possibly small scars on the sheath of the affected nerves that could be observed only by autopsy.

Eventually the damage caused by recurrent attacks and consequent scarring, and by broadening of the areas affected, cumulates to a point where impairment of physical and mental functioning is crippling in ways that vary with the intensity of the damage done and the location and scope of the areas served by the nerves that have been affected.

36. There is wide agreement among experts that paraesthesias of all kinds, such as tingling, prickling, coldness, burning, numbness, deadness, and like sensations in the face, trunk, or limbs seldom fail to appear at some point in the course of the disease and may be the first symptoms to excite attention.

There is evidence that paraesthesia of the face, if followed, over a period of years, by other symptoms that support an ultimate diagnosis of multiple sclerosis, might mark the onset of the disease, but the record reflects a sharp conflict of respectable opinion as to the frequency of this symptom as an initial manifestation.

One generally recognized authority says that paraesthesias confined to the field of the fifth nerve (which supplies the face and a rather substantial area of the side of the head extending behind the ear and above the normal hairline) occur with no little frequency, sometimes as the first symptom, whereas one of the expert witnesses, who testified that he had observed between one thousand and two thousand cases in recent years, said that he had never observed this particular symptom and that in his opinion it was uncommon at any stage of the disease.

It appears that a prickling sensation covering the entire area supplied by the fifth nerve should be regarded as more likely to be indicative of the onset of multiple sclerosis, if subsequently confirmed by other manifesta-

tions, than a mere transitory localized tingling of the face within the field of the fifth nerve but not covering the entire area supplied by that nerve.

There is also testimony of a recognized expert that transitory paraesthesias covering the whole area of the fifth nerve, that occurred years before there was enough evidence to support a firm diagnosis of multiple sclerosis, could be attributable properly to no other cause than the initial onset of the multiple sclerosis unless it were shown that some other specific cause, such as local anesthesia, a trauma, a serious sinus infection, a brain tumor, or some other substantial influence affecting the fifth nerve, was the specific cause of that particular early paraesthesia. Taking into account the whole of the evidence in this record, this analysis gives the impression of a retrospective diagnostic rule of thumb, doubtless useful in medical practice, but scarcely rising to the character of an immutable medical principle.

Indeed, it is impossible to find, from the variety of opinions concerning the onset of multiple sclerosis that are expressed in this record, any statement pertinent to the identification of the time of onset that is so positive and so widely accepted as to justify characterization as an accepted medical principle.

There is, moreover, credible evidence in the record, not only that fatigue, nervous exhaustion, tension, or worry can cause tingling sensations or numbness in the face, but that anxiety, self-concern, and worry are the most common causes of localized paraesthesias of the face. Dr. Abbott and Dr. Ely, neurologists who examined the plaintiff in January, 1941, when he had facial paraesthesias coupled with other symptoms, and to one of whom, at least, he reported the facial paraesthesias on the left side of the face that he had experienced in June of 1940, attributed his troubles variously to anxiety and exposure to draught (in the case of Dr. Ely) and to fatigue (in the

case of Dr. Abbott). None of the experts who testified criticized these diagnoses as made on the basis of the evidence available at the time they were made.

37. The conclusion seems clear from the whole of the evidence here that one who feels a transitory pricking or tingling of the face as the plaintiff did in June of 1940, may sense the onset of multiple sclerosis, or (passing over other possible causes that are unlikely in this case) may be merely extremely tired or worried to the point of nervous exhaustion. It is equally clear, even in the case of a person who, like the plaintiff, subsequently is found to have multiple sclerosis, that initial, transitory, paraesthesias might be indicative of the onset of the multiple sclerosis, or might be separately caused by fatigue, tension, or worry, or by some other cause that occurred before the first inflammation of the nerves that marked the physical beginning of multiple sclerosis. There is no basis in common experience for assuming that a man who develops multiple sclerosis was never tired out or deeply worried before the disease first struck him. Such a man could, before the actual onset of multiple sclerosis, have paraesthesia of the face that had no connection whatever with that disease.

38. For the reasons stated in findings 35, 36, and 37, I conclude that while the evidence here by no means dispels the possibility, or even a reasonable probability, that the plaintiff had multiple sclerosis in June of 1940, no established medical principle has been shown that compels the conclusion that he did. Nor does the record contain clear and unmistakable evidence that demonstrates beyond a reasonable doubt that he had multiple sclerosis before he entered on active duty in December, 1940. The possibility that the paraesthesias of the face in June, 1940, derived from causes other than multiple sclerosis is plainly present on this record.

39. On the basis of the facts here found, a determination whether the succession of administrative decisions made in this case, that plaintiff is to be regarded as having had multiple sclerosis before he entered on active duty, were arbitrary, capricious or contrary to law, depends upon the legal effect and applicability of standards and presumptions stated in the regulations and cannot be made solely as a finding of fact.

40. The evidence with regard to factors, if there are any, that may aggravate existing but abeyant multiple sclerosis is about as varied and conflicting as that relating to the onset of the disease and, if anything, is more tentative.

The aggregate impression that emanates from the diversity of views expressed in the records is that no one knows, for certain, whether environmental factors affect the course of the disease.

One recognized authority states that the attacks occur spontaneously and are not definitely related to any known environmental factor.

More recently published authorities express a belief, but no positive conviction, that infections, chilling, fatigue, and emotional upsets may precipitate attacks.

There is evidence that current medical thinking suggests, among precautions to be urged upon multiple sclerosis patients in an effort to prevent recurrences, such things as avoidance of fatigue, avoidance of stress, avoidance of emotional events, and the maintenance of good nutrition and good general bodily health, with the greatest emphasis on avoidance of physical and emotional stress.

Another recent, recognized authority states that "Fatigue has always been regarded as a precipitating or aggravating factor in multiple sclerosis."

Febrile illnesses, lowered general health, trauma—slight or severe, allergic disorders, and chills or sudden lowering of body temperature, are listed in a recent, professionally

recognized publication, among events said to be justifiably regarded as factors precipitating relapses.

Generally, however, even among those who consider these divers physical or emotional discomforts to be possible aggravators of multiple sclerosis, they are regarded as effective causes of relapses only when a relapse occurs a relatively short time—1 or 2 months or less—after the putative cause.

Such evidence as there is in this record does not support a general conclusion that the emotional and physical stresses of war service aggravate multiple sclerosis. On the other hand, there is no direct proof that they might not, in individual cases.

In summary, it is impossible to find, among the cautious, conflicting, tentative statements of the authorities, any established principle that would sustain a generalized determination whether environmental factors do or do not aggravate multiple sclerosis. There is no clear or unmistakable evidence that they do or that they do not. There is ample proof that no one really knows.

41. Whatever may be the over-all statistical truth about the effect of the rigors of active military service on victims of multiple sclerosis as a class, there is no clear or unmistakable evidence that the plaintiff's case was aggravated by the hazards, discomforts, and physical and emotional stresses he endured in the course of his extended period of active duty. After the episode that began in January, 1941, he had no clearly identified evidence of multiple sclerosis until 1946, after his active service had ended. There is no way to tell whether the recurrent fatigue, unsteadiness, and fibrillary twitchings he experienced but disregarded while he was overseas were attributable to multiple sclerosis or were merely direct results of overwork and nervous tension. Moreover, the evidence provides no basis for a judgment whether, if they were related to multiple sclerosis, they were brought on by the rigorous con-

ditions in which he lived and worked, or would have occurred in any environment, as mild exacerbations, normal to the course of the disease.

The fact is that the plaintiff continued, throughout a long period of service under difficult conditions, to perform his military responsibilities with physical competence adequate to their efficient fulfillment, and no evidence of disability was found when his active service came to an end in January of 1946.

42. On the basis of the facts here found, a determination whether the succession of administrative decisions made in this case,

> (a) that plaintiff is to be regarded as not having been disabled by multiple sclerosis, plainly present but in remission, when his active service ended in January 1946, and
>
> (b) that the disease is to be regarded as not having been aggravated by the conditions under which he served,

were arbitrary, capricious or contrary to law, depends on the legal effect and applicability of standards and presumptions stated in the regulations and cannot be made solely as a finding of fact.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and the petition is dismissed.

IX. Order of the court overruling plaintiff's motion for rehearing.

IN THE UNITED STATES COURT OF CLAIMS

ORDER

These cases come before the court on motions for rehearing under Rule 53 of the rules of this court and, on consideration thereof,

IT IS ORDERED this seventh day of November, 1962, that said motions be and the same are overruled as follows:

384-58 FRANK E. LIPP. Plaintiff's motion.

By THE COURT
/s/ MARVIN JONES
Marvin Jones,
Chief Judge.

XII. Order of the court overruling plaintiff's motion for reconsideration.

ORDER

These cases come before the court on motions for rehearings, reconsideration, new trials, or to amend judgments under Rules 53 and 54 of the rules of this court and, on consideration thereof,

IT IS ORDERED this eleventh day of January, 1963, that said motions are overruled as follows:

384-58 FRANK E. LIPP. Plaintiff's motion. (Judge Davis took no part in the disposition of this motion.)

By THE COURT
/s/ MARVIN JONES
Marvin Jones,
Chief Judge.

Appendix B

IN THE UNITED STATES COURT OF CLAIMS

No. 377-60

(Decided November 7, 1962)

BETTY FRIEDMAN, EXECUTRIX OF THE ESTATE OF JOSEPH FRIEDMAN, DECEASED, v. THE UNITED STATES

Guy Emery, for the plaintiff. Emery and Wood were on the briefs.

Charles M. Munnecke, with whom was Assistant Attorney General William H. Orrick, Jr., for the defendant.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, Judge, delivered the opinion of the court:

The plaintiff is the widow and executrix of Dr. Joseph Friedman who served in the Army on active duty as a medical officer from January 9, 1941, to January 30, 1947. She sues for disability retirement pay alleged to have been arbitrarily denied her husband.

During his service Dr. Friedman suffered a number of periods of serious illness and underwent considerable hospitalization. In 1944-1946 he had a series of boards to canvass his capacity for continued service, the last of which was a Retiring Board at Walter Reed General Hospital which decided on October 25, 1946, that he was not permanently incapacitated for active service, but also recom-

mended that he be placed on a period of temporary limited duty not in excess of six months, with re-examination and re-evaluation at the end of that time. This was not done and he was released, at his own request, on January 30, 1947, not for physical disability. The plaintiff claims that in December, 1946, before his release, Major Friedman wrote to Walter Reed, in response to an official request that he indicate whether he wished to remain on temporary limited service for six months or be separated at once, asking that he be recalled to active duty at the end of six months from his appearance before the Retiring Board (which had been in October, 1946), for the purpose of re-examination and re-evaluation at the hospital. What is said to be the decedent's office copies of such an exchange of letters is presented to us. The defendant answers that the files at Walter Reed and in the Adjutant General's Office contain no such correspondence or indication of it. Whether or not Dr. Friedman did make such a request in December, 1946, it is clear that after his separation in January, 1947, he made no further request of the Army and did nothing further to obtain disability retirement pay at any time during the remainder of his life. He died on October 4, 1958. After his death, his widow applied to the Board for Correction of Military Records on March 18, 1960, for a determination that he had been entitled to disability retired pay when he was released from active duty in January, 1947. This application was denied on August 17, 1960. The petition in this court was filed on September 30, 1960. The parties have both moved for summary judgment.

As our statement of the case implies, this is another suit for disability retirement pay in which the first issue is whether the claim is barred by the six-year statute of limitations, 28 U.S.C. 2501. There are a multitude of cases—past, present, and potential—involving this thorny question. The court's recent ruling in *Lipp v. United*

States, Ct. Cl. No. 384-58, decided April 4, 1962, has been the fulcrum for a broad range of claims and contentions put forth both by plaintiffs and the Government. Briefs in pending cases and motions for rehearing or reconsideration strongly suggest that there are large uncertainties and inconsistencies in our past decisions; they call upon us to reassess the court's general position on the bar of limitations in the field of pay cases. We therefore take the opportunity to spell out in detail, in this case and the related case of *Harper v. United States*, No. 206-59, also decided this day, the rules we shall now follow and which we believe the court has been following, in the main, in its prior holdings. In the present case, the result of our consideration is that the claim is barred by limitations. In the *Harper* case, we conclude that the suit is not time-barred.

We discuss first the course of this court's past decisions on the time bar in pay cases, including the rulings in the disability retirement area. Next we consider afresh the primary contention pressed by the plaintiffs in this and related cases: Does the determination of the Board for Correction of Military Records denying a claim for disability retirement ground a *new* cause of action upon which the claimant has six years to sue in this court? Finally, we treat the limitations problem as it is presented in this particular case.

I. The course of this court's decisions on the limitations bar in pay cases

We emphasize at the outset that, in canvassing the court's prior decisions, we have been mainly guided by our holdings, as distinguished from dicta and observations not truly part of the rationale of the decisions. Also, because the place of limitations in disability retirement cases becomes clearer when seen as part of the general

design of our rulings on that problem in pay cases of all types, we begin with a discussion of the different kinds of pay litigation from the standpoint of the time-bar.

A. *The "continuing claim" cases.* Over the years, the court's pay cases (military and civilian) concerned with the issue of limitations have often applied the so-called "continuing claim" theory, *i. e.*, periodic pay claims arising more than six years prior to suit are barred, but not those arising within the six-year span even though the administrative refusal to pay the sum claimed may have occurred, or the statute on which the claim is grounded may have been enacted, prior to six years.[1] These were suits for additional pay at a higher grade, or claiming greater compensation (under a statute or regulation) than the claimant was receiving, or seeking special statutory increments or allowances, etc. The important characteristics of all these cases were: (a) Congress had not entrusted an administrative officer or tribunal with the *determination* of the claimant's eligibility for the particular pay he sought; (b) the cases turned on pure issues of law or on specific issues of fact which the court was to decide for itself (*i. e.*, Congress had not established any administrative tribunal to *decide* either the factual or the legal questions); and (c) in general the cases called upon the court to resolve sharp and narrow factual issues not demanding judicial evaluation of broad concepts such as "disability" (concepts which involve the weighing of numerous factors and considerations as well as the exercise of expertise and discretion). For such

[1] *See Bachelor v. United States*, 8 Ct. Cl. 235, 238-239; *Ellsworth v. United States*, 14 Ct. Cl. 382, 395, aff'd on other grounds, 101 U. S. 170; *Blake v. United States*, 103 U. S. 227, 237; *Watson v. United States*, 21 Ct. Cl. 511, aff'd 130 U. S. 80, 82; *Moser v. United States*, 42 Ct. Cl. 86, 49 Ct. Cl. 285, 58 Ct. Cl. 164, aff'd 266 U. S. 236; *Brown v. United States*, 68 Ct. Cl. 734, 739; *Caudle v. United States*, 72 Ct. Cl. 331, 333-334; *Page v. United States*, 73 Ct. Cl. 626, 631; *Moore v. United States*, 76 Ct. Cl. 753, 754; *Stenderson v. United States*, 83 Ct. Cl. 633, 636; *Thomson v. United States*, 79 Ct. Cl. 224, 226; *Dove*

cases—in which no administrative agency has been set up to decide the claim, and the court passes *de novo* on all issues of law and fact—the "continuing claim" doctrine is wholly appropriate and in accord with the general jurisprudence in this country on the statute of limitations. Under those general principles the cause of action for pay or compensation accrues as soon as the the payor fails or refuses to pay what the law (or the contract) requires; there is no other condition precedent to the accrual of the cause of action (such as a factual determination by an executive tribunal or the exhaustion of some special procedure or remedy). And where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought. See, generally, *Odell v. United States*, 134 Ct. Cl. 634; *Gordon v. United States*, 134 Ct. Cl. 840, 843-4; *Lovadi v. United States*, 137 Ct. Cl. 97, 100, *cert. denied*, 353 U.S. 917.[1]

B. *Cases (other than disability retirement cases) in which the cause of action does not accrue until after a determination entrusted by Congress to an administrative official.*

[Footnote continued.]

v. United States, 89 Ct. Cl. 502, 506; *Cummings v. United States*, 89 Ct. Cl. 498, 501-2; *Hornblass v. United States*, 93 Ct. Cl. 148, 151, 156; *Long v. United States*, 93 Ct. Cl. 544, 546, 550; *Reynolds v. United States*, 95 Ct. Cl. 160, 161; *Lake v. United States*, 97 Ct. Cl. 447, 459; *Smith v. United States*, 98 Ct. Cl. 392, 396-7; *Sayers v. United States*, 102 Ct. Cl. 791; *Hermann v. United States*, 113 Ct. Cl. 54, 59-61; *Neff v. United States*, 113 Ct. Cl. 1; *Pacific Maritime Assn. v. United States*, 123 Ct. Cl. 667, 678; *McCormack v. United States*, 124 Ct. Cl. 111, 113-114; *Hart v. United States*, 125 Ct. Cl. 294, 296; *Wintree v. United States*, 125 Ct. Cl. 853, 857; *Lowry v. United States*, 125 Ct. Cl. 598; *Mistretta v. United States*, 128 Ct. Cl. 41; *Villarta v. United States*, 129 Ct. Cl. 748, 751 (claim for "overseas allowances"); *O'Brien v. United States*, 130 Ct. Cl. 713; *Gordon v. United States*, 134 Ct. Cl. 840; *Jalbert v. United States*, 147 Ct. Cl. 439; *Roberts v. United States*, No. 247-59, decided Nov. 2, 1960, slip op., p. 3; *Haislip, et al. v. United States*, Nos. 442-59, 466-59, 439-59, decided Jan. 18, 1961.

[1] For recent examples of references to this doctrine, see *Broche v. United States*, No. 299-61, decided June 6, 1962, slip op., p. 1; *McGrath v. United States*, No. 441-59, decided June 6, 1962, slip op., p. 1.

1. Concomitantly with its use of the "continuing claim" theory, the court has applied another principle in a different type of case. That second principle governs situations where Congress has deliberately given an administrative body the function of deciding all or part of the claimant's entitlement, *i. e.*, where Congress has interposed an administrative tribunal between the claimant and the court. In those instances the claim does not accrue until the executive body has acted (if seasonably asked to act) or declines to act. So also where Congress has insisted that a special demand be made or a special application filed. Generally (but not always) these cases involve evaluation of the facts by the agency, some degree of administrative discretion, and some measure of conclusiveness for the administrative determination. There may be acute differences of opinion whether the particular agency has such a special function or is simply akin to the General Accounting Office—see, *e. g.*, *Smithmeyer v. United States*, 147 U.S. 342, 357-358—but once the court has decided that the case falls into the former class it has ruled that the claim accrues, not when the events occurred, but when the agency has rendered or refused its determination.

Like the "continuing claim" theory, this second principle fits with general limitations law which recognizes that in appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law, and that where such a condition precedent has been created the claim does not ripen until the condition is fulfilled. See *Sese v. United States*, 125 Ct. Cl. 526, 528-530.

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[*] See, also, *Withers v. United States*, 69 Ct. Cl. 584, 587, holding that in the normal case consideration by the General Accounting Office is unnecessary and the statute of limitations is not tolled during such consideration. The Accounting Office is not normally a deciding tribunal. But cf. *Thomson v. United States*, 79 Ct. Cl. 224, 226-7, for a special statute requiring resort to that agency.

2. Earlier cases in this court of this general type are *Taylor v. United States*, 14 Ct. Cl. 339, 353, aff'd 104 U.S. 216, 221-222 (statute required demand upon the Secretary); *Lawton v. United States*, 18 Ct. Cl. 595, 601, aff'd 110 U.S. 146, 149 (same); *Harrison v. United States*, 20 Ct. Cl. 175 (same); *Louisiana v. United States*, 22 Ct. Cl. 284, 288, aff'd 123 U.S. 32, 37 (General Land Office required to consider State's proof); *Horton v. United States*, 31 Ct. Cl. 148, 150, 157 (administrative determination relating to informer's award). More recent cases are *Schaeffer v. United States*, 114 Ct. Cl. 568, 570, *cert. denied*, 344 U.S. 854 (determination by Maritime Commission of just compensation for requisitioned vessels); *Smith v. United States*, 67 Ct. Cl. 182 (same); cf. *Oro Fino Consolidated Mines, Inc., v. United States*, 118 Ct. Cl. 18, 21-22.[4]

3. In recent years the main field in which the court has applied this principle—aside from the disability retirement cases (to be considered *infra*)—is that of adverse personnel actions against federal employees (refusal of appointment to the federal service; discharge, separation, dismissal, or removal; refusal of reinstatement; reduction in grade; compulsory retirement). In those cases the court has recognized that Congress has entrusted the administrators with a large measure of discretion and has in effect established an executive agency as the primary tribunal for determining whether certain adverse action should be taken against the employee. Accordingly, the court has not applied the "continuing claim" theory but, instead, has viewed the entire cause of action as accruing once the appropriate agency has finally acted.

The first such case was *Middleman v. United States*, 91 Ct. Cl. 306, decided in 1940. A civil service employee

[4] See, also, *Tserions v. United States*, 94 Ct. Cl. 142, 147, *cert. denied*, 314 U. S. 668; *Utah Power & Light Co. v. United States*, 67 Ct. Cl. 602, 606; *King v. United States*, 48 Ct. Cl. 371, 375.

was dismissed on October 14, 1931—he claimed unlawfully—and suit was not filed until January 2, 1940. The court held the entire action barred by limitations. We read the summary opinion as ruling that discharges are outside the reach of the "continuing claim" doctrine because the administrative agency has been granted a large measure of discretion with respect to such personnel determinations. The subsequent opinions of the court in this field (discharge, appointment, reinstatement, reduction in grade, compulsory retirement) accord with the *Middleman* holding. The court as a court has not applied the "continuing claim" theory. In the recent case of *Feldman v. United States*, 149 Ct. Cl. 22, 30-32, the court explicitly rejected the applicability of that doctrine to discharge cases.

These decisions are not inconsistent with, or a departure from, the "continuing claim" series. The differing results flow from the existence of two separate categories of claims—"continuing claims" which are independent of administrative determination and those other claims dependent on prior administrative evaluation. The discretionary personnel-action cases do not fall into the "continuing claim" group, but, rather, into the second

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See *Croghan v. United States*, 116 Ct. Cl. 577, 587 (removal); *Siskind v. United States*, 116 Ct. Cl. 809 (same); *Gray v. United States*, 124 Ct. Cl. 313, (appointment); *Harmon v. United States*, 124 Ct. Cl. 751, 754-5 (discharge); *Thomas v. United States*, 125 Ct. Cl. 76, 79-80 (reduction in grade); *Group v. United States*, 125 Ct. Cl. 135, 136-137 (same); *Goodwin v. United States*, 127 Ct. Cl. 417 (reinstatement order by Civil Service Commission creates new cause of action for back pay illegally withheld, even beyond six years); *Palmer v. United States*, 129 Ct. Cl. 322, 325-326 (demotions-removal); *Villarta v. United States*, 129 Ct. Cl. 748, 751 (claim for difference in pay an "appointment" claim); *O'Brien v. United States*, 130 Ct. Cl. 713, 714 (reinstatement at lower grade); *Riley v. United States*, 130 Ct. Cl. 113 (demotion); *Goldstein v. United States*, 131 Ct. Cl. 228, 232-3 (military discharge); *Upton v. United States*, 132 Ct. Cl. 355, 358 (demotion); *Feldman v. United States*, 149 Ct. Cl. 22 (discharge); see also *Dorer v. United States*, 115 Ct. Cl. 83 (all sums sought were for periods prior to six years); *Love v. United States*, 122 Ct. Cl. 144 (same). Cf. *Cannon v. United States*, 137 Ct. Cl. 104 (no opinion of the court) and *McCormick v. United States*, 124 Ct. Cl. 111 (special status of claims under the Selective Training and Service Act).

class in which the cause of action accrues only after final administrative decision, and then accrues as a whole. There are good reasons of policy for refusing to apply the "continuing claim" principle to such cases. The *Feldman* opinion, *supra*, points out that discharged employees should not be permitted to wait years before suing. The same is true of employees aggrieved by other personnel actions, such as refusals to appoint or demotions. Judicial relief should be sought promptly so that the administrators can know whether the employee should be reinstated, restored to his former grade, etc. Even though this court grants only money relief, its rulings on the legal issues normally determine whether the employee will be restored to duty. There is also the dislocation and expense connected with the employee hired to replace the plaintiff. In sum, more than the plaintiff's own salary is at stake.

4. In deciding in these cases that limitations runs from the date of the administrative action, the court has sometimes had to choose which administrative action it will regard as operative. Where the statute requires that a particular administrative remedy must be exhausted (*i. e.*, a mandatory remedy), there has ordinarily been no problem—the statute of limitations does not run until the completion of that process and, by like token, the claimant cannot bring suit until he has reasonably exhausted that remedy. See, *e. g.*, *New River Collieries Co. v. United States*, 65 Ct. Cl. 205, 232-235; *Smith v. United States*, 67 Ct. Cl. 182, 206-208; *Dawnic Steamship Corp. v. United States*, 99 Ct. Cl. 537, 578-579; *Utah Power & Light Co. v. United States*, 67 Ct. Cl. 602, 606; *Mistretta v. United States*, 128 Ct. Cl. 41, 45; *Caiffo v. United States*, 131 Ct. Cl. 60, 63-64, 66-67.

Where, however, an administrative remedy is permissive (*i. e.*, suit may be brought without exhausting the

remedy), the court has usually held that the running of limitations is not deferred or tolled by such optional administrative consideration. A series of recent cases, involving the right of veterans to appeal to the Civil Service Commission (under the Veterans' Preference Act) from adverse personnel actions, may possibly be thought to have introduced an exception. In *Love v. United States*, 122 Ct. Cl. 144, 146, and *Thomas v. United States*, 125 Ct. Cl. 76, 79-80, the court ruled—on the assumption that the remedy was permissive only—that an appeal to the Commission did not defer or toll the statute of limitations. See also *Gray v. United States*, 124 Ct. Cl. 313. In *Martilla v. United States*, 118 Ct. Cl. 177, 179-180—not a limitations case—the holding was that the plaintiff should have pursued his appeal to the Commission (*i. e.*, that the appeal was required or mandatory) and that no cause of action existed until he did so. In *Cuiffo v. United States*, 131 Ct. Cl. 60, 63, 68, however, the court held pursuit of the Commission remedy unnecessary where the plaintiff had been in effect informed that he had either an appeal to the Commission or further review within his own agency (but probably not both); the opinion also stressed the reasons for considering the appellate remedy (*i. e.*, appeal to the Commission) permissive rather than mandatory. In *Adler v. United States*, 134 Ct. Cl. 200, *cert. denied*, 352 U.S. 894, the court, although recognizing that appeal to the Commission was

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[1] See, e. g., *Battelle v. United States*, 7 Ct. Cl. 297; *Carlisle v. United States*, 29 Ct. Cl. 414; *Curtis v. United States*, 34 Ct. Cl. 1; *Cohen, Goldman & Co., Inc., v. United States*, 77 Ct. Cl. 713, 730, cert. denied, 290 U. S. 681; *Hendricks v. United States*, 81 Ct. Cl. 809; *Pool v. United States*, 85 Ct. Cl. 121, 124; *John P. Moriarty, Inc., v. United States*, 97 Ct. Cl. 338; *Yingling v. United States*, 101 Ct. Cl. 291; *L. E. Myers Co., Inc., v. United States*, 105 Ct. Cl. 459; *Love v. United States*, 122 Ct. Cl. 144, 146; *Tan v. United States*, 122 Ct. Cl. 662, 664-5, cert. denied, 344 U. S. 895; *Gray v. United States*, 124 Ct. Cl. 313; *See v. United States*, 125 Ct. Cl. 526, 527-531; *Mistretta v. United States*, 128 Ct. Cl. 41. See also *McMahon v. United States*, 342 U. S. 25; *Soriano v. United States*, 352 U. S. 270; *Smithmeier v. United States*, 147 U. S. 342, 357-358.

not mandatory, nevertheless persuaded in its discretion to consider a veteran's demotion case until appeal to the Commission had been completed. In many, as in *Keeney v. United States*, No. 11-58, decided June 8, 1960, slip op., p. 8, the court ruled that, even though the claimant's "appeal to the Civil Service Commission is merely permissive rather than mandatory," limitation did not begin to run until after the Commission's decision, since that ruling would be binding on the employing agency and the administrative action would therefore not become final until the Commission had acted.

C. *Disability retirement pay cases.*[1] The court has dealt with the limitations problem, in the disability retirement field, in over 30 decisions since 1954. Without attempting to harmonize everything said in each of these opinions, we believe that the *holdings*, in totality, do fall generally into a rational pattern.

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[1] We include in this category only those disability retirement cases in which there was necessarily involved the issue of whether the claimant should have been retired for disability. Cases in which a claimant previously retired for physical disability demands pay at a higher rate—e. g., because of a change in the statutory method of computation—have been generally handled by the court under the "continuing claim" doctrine, *supra*.

Uhley v. United States, 128 Ct. Cl. 605; *Rosnick v. United States*, 132 Ct. Cl. 1; *Girard v. United States*, 133 Ct. Cl. 135; *Dan v. United States*, 133 Ct. Cl. 161; *Capps v. United States*, 133 Ct. Cl. 811; *Loch v. United States*, 133 Ct. Cl. 953; *Lane v. United States*, 133 Ct. Cl. 774; *Odell v. United States*, 134 Ct. Cl. 631; *MacFarlane v. United States*, 134 Ct. Cl. 755; *Southcott v. United States*, 135 Ct. Cl. 190; *Sonkaraz v. United States*, 135 Ct. Cl. 88, cert. denied, 352 U. S. 918; *Barker v. United States*, 135 Ct. Cl. 42, cert. denied, 352 U. S. 955; *Levias v. United States*, 137 Ct. Cl. 97, cert. denied, 353 U. S. 917; *Conlin v. United States*, 137 Ct. Cl. 428, cert. denied, 53 U. S. 916; *Price v. United States*, 137 Ct. Cl. 685; *Furlong v. United States*, 138 Ct. Cl. 93; *Hutchinson v. United States*, 137 Ct. Cl. 889; *San Millan v. United States*, 139 Ct. Cl. 485; *Suter v. United States*, 139 Ct. Cl. 466, cert. denied, 355 U. S. 926; *Prower v. United States*, 139 Ct. Cl. 511; *Freedman v. United States*, 141 Ct. Cl. 239; *Brown v. United States*, 141 Ct. Cl. 55; *Patterson v. United States*, 141 Ct. Cl. 435; *Ecks v. United States*, 145 Ct. Cl. 522; *Allin v. United States*, 147 Ct. Cl. 459; *Wemer v. United States*, 148 Ct. Cl. 445; *Knight v. United States*, No. 61-60, decided Jan. 18, 1963; *Frederick v. United States*, No. 171-56, decided July 15, 1960; *Lupo v. United States*, No. 384-58, decided April 4, 1962; *Hoey v. United States*, No. 170-58, decided April 4, 1962; *Merson v. United States*, No. 5-60, decided April 15, 1962 (order); *Melvday v. United States*, No. 401-58, decided July 18, 1962, slip op., p. 2.

1. *The claim accrues on final action of a board, not on release from active service.*—The court has consistently held that Congress has entrusted the military boards with the task of determining whether a serviceman should be retired for disability and therefore that no cause of action arises (and the statute of limitations does not run) until a proper board has acted or declined to act. See, *e.g.*, *Furlong v. United States*, 138 Ct. Cl. 845-846; *Uhlen v. United States*, 128 Ct. Cl. 608, 611-612; *Girault v. United States*, 133 Ct. Cl. 135, 143-144; *Odell v. United States*, 134 Ct. Cl. 634, 638; *Lipp v. United States*, No. 384-58, decided April 4, 1962, slip op., p. 2. No final holding of the court is truly inconsistent with this position; and there is no final holding that mere separation from the service without disability retirement, in and of itself, starts the limitations period. On the contrary, *San Millan v. United States*, 139 Ct. Cl. 485, 487, 497, 499,* in which the Retiring Board was not requested until 31½ years after release, is a recent direct holding that limitations runs not from release but from the later refusal to grant a Retiring Board; see also *Proper v. United States*, 139 Ct. Cl. 511, *Patterson v. United States*, 141 Ct. Cl. 435, 438, and *Frederick v. United States*, No. 111-56, decided July 15, 1960, for comparable direct holdings. The recent *Lipp* opinion also recognizes this basis of the cause of action

* The opinions which can be thought to be contrary are:

(1) In *Hoen v. United States*, No. 176-59, decided April 4, 1962, the court rejected the claim on the merits and then added summarily (prompted by the *Lipp* decision which came down the same day) that the claim was also barred by limitations. However, it does not appear that Hoen had or applied for a Retiring Board at the time of his separation in 1946 (he did not ask for a Retiring Board until 1958). On April 13, 1962, in *Merson v. United States*, No. 5-60, the court dismissed by order (on the authority of *Lipp*) a disability retirement claim by a veteran who apparently had no Retiring Board and took no action until he applied to the Correction Board in 1958. The *Merson* case is pending on a motion for reconsideration.

(2) The holding in *Price v. United States*, 137 Ct. Cl. 685, is indecisive. Judge Whitaker's opinion, in which Judge Laramore joined, treated the action of the Disposition Board as sufficient to start the

Thus, the court has uniformly applied to this type of case the doctrine (discussed *supra*) that where an administrative decision is mandatory the claim is not ready for suit until such a decision is had or is excused. That is the condition precedent to the accrual of the cause of action. Mere release from active duty without a Retiring Board (or request for one) or without disability retirement pay is not enough to start limitations running.

2. *There is no tolling for further consideration after final board action.*—The court has also held, with one possible exception, that where a proper board has acted *finally* the running of the statute is not tolled by later consideration by other boards or agencies. In particular, where full action by a Retiring Board had been had (or refused), later review by the Disability Review Board or the Correction Board does not toll the statute. *Rosnick v. United States*, 132 Ct. Cl. 1; *Girault v. United States*, 133 Ct. Cl. 135, 143-145; *Duff v. United States*, 133 Ct. Cl. 161; *Levine v. United States*, 133 Ct. Cl. 774, 779-780; *Odell v. United States*, 134 Ct. Cl. 634; *MacFarlane v. United States*, 134 Ct. Cl. 755; *Soukaras v. United States*, 135 Ct. Cl. 88, *cert. denied*, 352 U.S. 918; *Barker v. United States*, 135 Ct. Cl. 42, *cert. denied*, 352 U.S. 935; *Levadi v. United States*, 137 Ct. Cl. 97, *cert. denied*, 353 U.S. 917; *Conlin v. United States*, 137 Ct. Cl. 128, *cert. denied*, 353 U.S. 916; *Hutchinson v. United States*, 137 Ct. Cl. 889; *Lipp v. United States*, No. 384-58, decided April 4, 1962. These cases hold that the *final* action of the first proper board to act (finally) is decisive for limitation purposes.

(Footnote continued.)

statute running; no Retiring Board was requested at the time. Chief Judge Jones concurred in the result only. Littleton and Madden, JJ. would not have passed upon the limitations issue at all. Similarly, though there may have been no Retiring Board in *MacFarlane v. United States*, 134 Ct. Cl. 755, there was, prior to release, a Disposition Board and extensive medical examination to determine disability in both *MacFarlane* and *Price*, the majority of the court appears to have treated the Disposition Board (and consequent proceedings) as the equivalent of a Retiring Board proceeding.

The possible exception is *Frederick v. United States*, No. 111-56, decided July 15, 1960 (the opinion in which contains no now-relevant discussion of limitations). The plaintiff was discharged in 1945 after a Retiring Board found him disabled but his disability not service-connected; in 1952 he applied to the Disability Review Board which affirmed the Retiring Board's findings; in March 1954 he applied to the Correction Board which (after proceedings the court held to be irregular) refused to grant him disability retirement; suit was begun in 1956. The court's opinion does not refer to the prior cases on limitations to which we have just referred, and discusses that subject only in the context of deciding whether the plaintiff should recover his pay back to the date of his separation or only for the six years prior to suit; of the majority, Judges Madden and Littleton thought the former and the Chief Judge the latter, and the judgment was limited to the six prior years. (Judges Whitaker and Laramore dissented.) Since there is no explanation in the majority opinion, one must speculate as to basis for the silent holding that the entire claim was not time-barred. There are at least two possible rationales which would not conflict with the line of cases beginning with *Rosnick*.[10] In any event, the absence of discussion in the opinion precludes us from treating *Frederick* as a "hard" or full precedent.

3. In a number of situations the court has held that the final action of the first board to decide has been delayed or deferred by one or another circumstance and therefore that the cause of action has not accrued until the later

[10] Since the Correction Board actually reopened the proceedings, and directed the examinations of Frederick and a new hearing before a Physical Evaluation Board (as successor to the former Retiring Boards), the court could have viewed the case as one in which the initial board's decision was tentative and therefore within the class of case, to be discussed immediately below, in which the claim does not accrue until final action. Or it may be that, since the court stressed the irregularities in the Correction Board's *procedures*, it thought that those irregularities in procedure (rather than the arbitrariness of the substantive determination) created a new cause of action on which the plaintiff could recover.

time. In *Ulley v. United States*, 128 Ct. Cl. 608, the plaintiff was erroneously told by Air Force medical officers that his disabilities would not warrant retirement for disability and consequently he did not seek a Retiring Board when he was separated in December 1945; he asked for and was refused such a board in 1951 and applied to the Correction Board in 1952. Suit was brought in February 1953 (within six years of the latter two requests); the court held that limitations did not begin to run on his separation in December 1945 because his failure to ask for a Retiring Board was excused by the misleading information. *Furlong v. United States*, 138 Ct. Cl. 843, 844, 846, is another case in which the officer failed to ask for a Retiring Board because he was misled. In *Capps v. United States*, 133 Ct. Cl. 811, and *Loeb v. United States*, 133 Ct. Cl. 937, the original Board action was held deprived of finality because the Secretary of War ordered that the case be reopened and reconsidered under a new regulation, and it was so reconsidered within six years of the commencement of the suit. In *Satyr v. United States*, 139 Ct. Cl. 466, 468, 469-470, 471, *cert. denied*, 355 U.S. 926, the officer had a Retiring Board (which did not act finally) and was released without retirement pay in 1946, but in 1949 and 1951 he was erroneously refused a new Retiring Board (to make a further evaluation); he applied to the Correction Board in 1953; suit was brought in 1954. The tentative action of the Retiring Board in 1946 was (in effect) held non-final, and the statute of limitations further deferred by the erroneous refusal to grant the plaintiff subsequent re-evaluation; therefore the 1954 suit was not barred by the six-year statute. A similar case was *Friedman v. United States*, 141 Ct. Cl. 239, 254-256, in which the original Retiring Board (in 1947) did not purport to act finally and the officer's claim was not finally denied until December 1952 (within the six-year period). See, also, to the same effect, *Allin v. United States*, 147

Ct. Cl. 459, 465, 471-2, 474-476 (initial board action not final); *Weiner v. United States*, 148 Ct. Cl. 445, 450, 455, 460-1, 463-4 (initial board action not final and Government erroneously refused later request for further consideration).

4. *Where there is no Retiring Board, the claim accrues on action of the Correction Board.*—The court has also held that claims were not barred where the serviceman was released (prior to the six-year period) without having or requesting a Retiring Board (and without being misled into failing to ask for one) and where the first board to which request was made was the Correction Board (which acted adversely or declined to act within six years prior to suit). In *Proper v. United States*, 139 Ct. Cl. 511, 512, 515, the first board to which the plaintiff (who was released in April 1948) applied (in 1954) was the Correction Board; suit was brought in May 1954. The court held that "because of the peculiar facts and circumstances * * * Correction Board proceedings were the only ones open to this plaintiff, and the only administrative action ever taken on his claim for disability retirement with pay was in connection with his application to that Board." In *Patterson v. United States*, 141 Ct. Cl. 435, 438, the plaintiff was released without a Retiring Board in March 1946 and did not seek relief until he applied to the Correction Board in January 1953; suit was begun in 1958. The court held broadly that the rule was "that where a plaintiff has received no determination of his eligibility for disability retirement pay by any board until the correction board has acted, his cause of action accrues not at the time of his separation from the service, but at the time of the alleged wrongful action of the correction board."

[1] The only "peculiar facts and circumstances" in the case were that, although it was plain that he was unwell while in service, the plaintiff's malady was not diagnosed before his release, and his symptoms were largely in remission during his service; his symptoms grew much worse afterwards and his illness more apparent.

approved by the Secretary, in wrongfully refusing to correct the records and grant the plaintiff disability retirement with pay." There was no suggestion that Patterson had good justification for failing to apply to the Retiring Board.

Although they hold that limitations does not defeat the suit of an officer who first brings his claim for disability retirement to the Correction Board, the *Proper* and *Patterson* cases are not incompatible with the other decisions holding that the claim arises upon the final action of the Retiring Board. The rationale of all the cases, taken together, is that Congress has given the function of deciding entitlement to disability retirement to the Secretary, acting with or through a statutory board and that the claim does not accrue until final action on the basis of the determination of the first competent board to decide. As this court has said, "All of these boards, the Retiring Board, the Disability Review Board, and the Board for Correction of Military Records act only in an advisory capacity to the Secretary of War. If his decision on the retirement rights of an officer is alleged to have been arbitrary, then the officer's right to come to the court for redress accrues as soon as the arbitrary decision is rendered." *Girault v. United States*, 133 Ct. Cl. 135, 144, quoted in *Lipp*, slip op., p. 4, fn. 2. Either the Retiring Board or the Correction Board is a proper board to perform this function of advising the Secretary;[1] and where a Retiring Board has not been had or requested, the officer's application to the Correction Board together with the action of that Board take the place of the Retiring Board's function in triggering the statute of limitations. The Correction Board becomes the first proper board to act (or to be asked to act) on the matter, and the claim does not ripen until that Board's action is final. The single

[1] The Correction Board's statutory charter is broad enough to encompass the functions of the Retiring Board as well as of the Disability Review Board.

judicial claim—not a *new* cause of action—never accrues (under the general principles discussed *supra*) until the Correction Board's decision. In that sense the Correction Board proceeding becomes a mandatory remedy; without it, the case in this court would be dismissed as premature on the ground that the plaintiff did not seek or obtain a final decision within the administrative hierarchy.[1]

5. *The Lipp decision.*—*Lipp v. United States*, *supra*, was a case in which the plaintiff requested a Retiring Board in 1948, and again in 1949 and 1950 (slip op., p. 4). The opinion followed and was in accord with the *Rosnick* line, governing instances in which there was final action of a Retiring Board more than six years before suit. *Lipp* was not a case (like *Proper* or *Patterson*) in which no Retiring Board was had or requested. Nothing in the opinion controls any other type of case than that before the court; the opinion does not govern a case in which no Retiring Board was requested or in which the Retiring Board's action was not final, etc. Footnote 1 of the *Lipp* opinion does say that "it is questionable that an officer could accrue a cause of action by a request for retirement board proceedings after his release to inactive duty," but the court

[1] In *McAulay v. United States*, No. 401-58, decided July, 1962, slip op. p. 2, the court recently said that: "This court has consistently held that before a person can bring suit in this court for disability retired pay, he must first exhaust his administrative remedy of applying to a Retiring Board, or Physical Evaluation Board for an administrative determination of his right to retirement for physical disability. This is not a permissive remedy; it is mandatory, in the absence of extenuating circumstances." But the same paragraph of the opinion points out that no application was made to the Correction Board and that no administrative steps at all were taken by McAulay. The *McAulay* opinion does not hold that the Correction Board cannot be substituted in place of a Retiring Board when the latter was not requested or convened—as was held in *Proper* and *Patterson*.

By order of April 13, 1962, the court held the claim in *Merson v. United States*, No. 5-60, barred by limitations on the authority of *Lipp*. Merson, like Proper and Patterson, had been released from active service (in 1946) without a Retiring Board or a request for one. He took no action to obtain disability retirement pay until 1958 when he applied to the Correction Board. A motion for reconsideration is pending in *Merson*.

also stresses that it was not necessary to decide that point. In prior cases the court has not indicated that a post-release request for a Retiring Board was too late, at least if entertained or considered timely by the armed service itself. See *Updike v. United States*, 132 Ct. Cl. 627 (overturning ruling of the Comptroller General that reserve officers could not be determined to be eligible for disability retirement after their release from active duty); *Adams v. United States*, 127 Ct. Cl. 470, 475; *San Millan v. United States*, 139 Ct. Cl. 485, 487, 497, 499; *Utley v. United States*, 128 Ct. Cl. 608; *Furlong v. United States*, 138 Ct. Cl. 843; *Suter v. United States*, 139 Ct. Cl. 466, *cert. denied*, 355 U. S. 926; *Friedman v. United States*, 141 Ct. Cl. 239; *Allin v. United States*, 147 Ct. Cl. 459; *Weiner v. United States*, 148 Ct. Cl. 445.

6. "*New cause of action.*"—The main burden of the present argument of the plaintiffs in this and related cases is that Correction Board action always gives rise to a *new* cause of action on which the statute will not run until six years after the Correction Board's final action—regardless of prior determinations by the Retiring Board or the Disability Review Board. The only ruling of the court which gives real support to that contention is the interlocutory holding in *Knight v. United States*, No. 64-60, Ct. Cl., decided January 18, 1961, which was expressly overtugned in the *Lipp* opinion.[4] We do not find any other decision (as distinguished from general observation) of the court which rests on or invokes this theory.

(a) The *Knight* decision is contrary to the holdings in the cases discussed, *supra*, refusing to toll the statute where final action of a proper board has been had, and relief is then sought from other boards (including the Cor-

[4] In *Knight*, there had been prior final action by a Retiring Board and the Disability Review Board; the court held, on a motion to dismiss, that limitations ran, not from the final action of these boards, but from that of the Correction Board.

rection Board).[15] It is said by the present plaintiffs that in those cases no point was made that action by the Correction Board grounded a new cause of action; we are not certain that this is so but in any event it is implicit in those rulings that the only claim upon which suit could be brought necessarily accrued upon final action by the initial board. That is the foundation-stone of the rationale of those decisions. It would be wholly technical to distinguish them on the ground that the plaintiffs had not formulated their arguments in terms of the creation of a new, separate, cause of action as a result of the Correction Board's decision. If the present plaintiffs' theory is to be adopted, those cases would, in effect, have to be overruled, at least partially.[16] On the other hand, in overruling *Knight*, the *Lipp* decision did not overrule any other holding if *Lipp* is confined to the only class it purports to cover (*i.e.*, prior final board action more than six years old and only Correction Board action, in a review capacity, within the limitations period).[17]

(*b*) It is true that there are expressions in some of the other opinions of the court which can be read, if isolated from the facts and holding of the particular case, as giving support to the general theory that Correction Board action engenders a fresh cause of action. None of these expressions is clear, decisive, or truly relevant, or represents a holding.

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[15] *Rosnick; Girault; Duff; Levine; Odell; MacFarlane, Soukaras; Barker; Levadi; Conlin; Hutchinson;* and *Prick*. But see *Frederick v. United States*, No. 111-56, decided July 15, 1960, discussed *supra* and *infra*.

[16] Certain but not all of the cases can be distinguished as resting on alternative grounds.

[17] *Frederick v. United States*, No. 111-56, Ct. Cl., decided July 15, 1960, is a disability retirement case in which the court accepted jurisdiction although there may have been prior final board action outside the six-year span. But, as pointed out *supra*, the *Frederick* opinion does not discuss this problem and may well be explainable on the ground that the initial board's action was not final or that the Correction Board's errors in *procedure* created a new claim.

First, there are general statements that arbitrary action by the Correction Board might ground a claim (*Rosnick v. United States*, 132 Ct. Cl. 1, 5, 6; *Carlin v. United States*, 121 Ct. Cl. 643; *Betts v. United States*, 145 Ct. Cl. 530). This is correct as a generalization, but it does not mean that where a claim is judicially barred by limitations an arbitrary refusal by the Correction Board to grant it will necessarily create a new judicial cause of action.[1] *Second*, there are cases in which the claim was held free of limitations—for one or another of the reasons discussed above, which do not depend on the creation of a new claim through Correction Board action—in which the opinion also uses language which is said to suggest that a new claim existed (*Friedman v. United States*, 141 Ct. Cl. 239, 254-256, explicitly leaving the issue open; *Powell v. United States*, No. 162-59, Ct. Cl., decided June 8, 1960, slip op., pp. 10-11, reference to everything prior to Correction Board action being barred by limitations; *Proper v. United States*, 139 Ct. Cl. 511, 512-13, possible implication that Secretary's action in 1955, after Correction Board proceedings, created the claim). But these passing, somewhat ambiguous, observations do not indicate that (except in *Knight*) the court as a whole has accepted, or decided on the basis of, the theory that Correction Board action normally creates a *new* claim.

Third, there are cases, not involving eligibility for disability retirement, in which the court has allowed a recovery which takes account of more than a six-year period, on the ground that the claim was timely because founded on the action of a board. In *Seabrook v. United States*, 135 Ct. Cl. 190, the initial Retiring Board held in 1946 that the plaintiff was not entitled to disability retirement, but two years later (in 1948) the Navy reopened his case (at

[1] Such statements are also consistent with the view that arbitrary Correction Board action can ground a new claim in some circumstances but not in others.

his request) and a new Retiring Board held that he was disabled. He was not, however, paid retired pay for the period between his release from duty in 1946 and his placement on the retired list in 1948. Suit was brought in May, 1954. The court held (following earlier decisions such as *Holt v. United States*, 134 Ct. Cl. 801, *Hamrick v. United States*, 120 Ct. Cl. 17, and *Ramsey v. United States*, 123 Ct. Cl. 304) that since the second board had held his disability incident to service it necessarily followed as a matter of law that the plaintiff was entitled to retirement pay from the date of his release (but recovery was limited to the six-year period prior to the bringing of suit). Similarly, in *Brown v. United States*, 141 Ct. Cl. 557, the serviceman was released in 1946 (after appearing before a Retiring Board) without disability retirement pay. On May 10, 1949, the Disability Review Board reversed this finding, but he was not given disability retired pay for the period from 1946 to 1949. In 1952, he applied to the Correction Board to modify the records so as to entitle him to this back pay, but the Board refused to do so. Suit was filed on May 9, 1955, within six years of the Disability Review Board's decision. Judgment was given for the full amount requested (unlike *Seabrook* where it was limited to the six prior years). See also *Caddington v. United States*, 147 Ct. Cl. 629, 635 (full amount). In *Eicks v. United States*, 145 Ct. Cl. 522, 526-527, the plaintiff, who had been granted disability retirement in 1944, sought additional retired pay on the basis of accumulated leave which he said he should have been allowed before his separation in that year. In 1954 he applied to the Correction Board to change his records; the majority of the Board agreed with him but the Secretary agreed with the dissenter and denied relief. Suit was filed on December 2, 1955, for additional back pay from 1944 to September, 1949 (at which time the Career Compensation Act changed the method of computation). The court held the

plaintiff entitled to recover. There was no bar of limitations, the court said, because "this present cause of action arose on the refusal of the Board, after the Secretary's disapproval, to correct plaintiff's record" and "the right to recover depends on whether the refusal to correct the record was arbitrary." On the merits the court held the plaintiff entitled to recover as a matter of law because the statutes and regulations in effect in 1944 gave him accumulated leave as a matter of right.

These cases—*Seabrook*, *Brown*, *Caddington*, and *Eicks*—stand not for the general proposition that any action of the Correction Board creates a new cause of action (for limitation purposes), but for a considerably narrower rule. *Brown*, *Seabrook* and *Caddington* clearly dealt with implementation of a *favorable* board decision and in that sense the claim was, and had to be, founded on the board's own action. It was a necessary prerequisite.[19] *Eicks* can be viewed in the same light, as implementing the favorable decision in 1944 granting the plaintiff disability retirement. The court thought it necessary to correct the plaintiff's records to show the accumulated leave (in order to compute the additional pay he sought) and only the Correction Board could make the required correction.[20]

[19] A similar case, not involving disability pay, is *Goodwin v. United States*, 125 Ct. Cl. 417, where a civil service employee reinstated in his job by order of the Civil Service Commission was held entitled to recover back pay, even beyond six years, because the Commission's reinstatement order, mandatory on the employing agency, created new legal rights in the employee. See, to the same effect, *Feldman v. United States*, 149 Ct. Cl. 22; and *O'Brien v. United States*, 124 Ct. Cl. 655.

[20] If *Eicks* were taken as holding that Correction Board action on a *legal* pay claim, based directly on statutes or regulations and not requiring administrative determination, creates a *new* cause of action for sums otherwise time-barred, it would be contrary to prior and subsequent decisions. In *Goldstein v. United States*, 131 Ct. Cl. 228, 233, the court had barred a veteran's claim for back service pay at a higher grade (for a period prior to six years) even though the Correction Board had denied the same claim within six years. In *Haislip, et al. v. United States*, Nos. 442-59, 466-59, and 439-59, decided Jan. 18, 1961, the court rejected, as barred, a claim for additional pay (due to "re-retirement") even though the Correction Board purported, within

7. *Summary:* As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:

(*a*). The judicial claim for disability retirement pay does not accrue on release from active duty, but rather on *final* action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).

(*b*). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).

(*c*). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(*d*). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(*e*). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

[Footnote continued]

six years, to correct the records to show that plaintiffs were entitled to the extra money. The court held that the claim was one of law and the claim had accrued 13 years earlier. And in *White v. United States*, No. 447-59, decided by order of April 13, 1962, the court held barred a 1959 suit for captain's pay (from 1942 to 1947) by an enlisted man who was ordered to active duty as a captain in 1942 but who never served in that rank (because the orders were shortly cancelled). The plaintiff sought relief from the Correction Board on the ground that the termination of his appointment as captain was erroneous and unfair; relief was denied in October 1955; suit was brought in 1959. The court considered the claim to have accrued no later than 1947.

(*f*). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

II. DOES ACTION BY THE CORRECTION BOARD CREATE A NEW CLAIM?

The plaintiffs in this and other cases also urge that, regardless of the course of our prior decisions, we should now hold that action by the Correction Board gives rise to a *new* cause of action, despite a prior ruling by a Retiring Board or the Disability Review Board, on which the claimant has six years to sue. In deference to these requests, we have carefully considered the issue *de novo* and afresh. We have again concluded that where, as in the *Lipp* type of case, the Correction Board is in effect reviewing a prior adverse determination by a Retiring Board or the Disability Review Board (or a refusal to convene such a board), the Correction Board's adverse decision does not give rise to a new cause of action. We continue, however, to agree with our past rulings that, where the Correction Board is not a reviewing tribunal but is the first board to consider or determine finally the claimant's eligibility for disability retirement, the single cause of action accrues upon the Correction Board's final decision.

A. *Judicial review.* The normal rule, where a proper administrative tribunal has denied or refused to consider a claim and further administrative remedies are permissive not mandatory, is that the judicial cause of action arises immediately upon the initial tribunal's action and does not start again upon a subsequent administrative decision affirming that holding. It is said, however, that that

rule should not apply to the Correction Board remedy because Congress intended that there be judicial review of all Correction Board decisions. We find this argument unpersuasive.

1. It should be noted, first, that it is far from plain to what extent *any* judicial review of Correction Board action was affirmatively intended by Congress. The statute and the legislative materials are not clear and arguments can be made both ways.[21] The Government has often argued that Congress did not intend any review of Correction Board decisions. But for us the answer has already been given by the court's decisions—which have consistently held that in disability retirement cases arbitrary actions of the Correction Board, if challenged within the applicable limitations period, can be reviewed here. See, *e. g., Lemly v. United States*, 109 Ct. Cl. 760; *Prince v. United States*, 127 Ct. Cl. 612, 617; *Gordon v. United States*, 129 Ct. Cl. 270, 277; *Hiett v. United States*, 131 Ct. Cl. 585; *Wales v. United States*, 132 Ct. Cl. 765, 771; *Suter v. United States*, 139 Ct. Cl. 466, *cert. denied* 355 U. S. 926; *Proper v. United States*, 139 Ct. Cl. 511; *Friedman v. United States*, 141 Ct. Cl. 239; *Patterson v. United States*, 141 Ct. Cl. 435, 437-8; *Ficks v. United States*, 145 Ct. Cl. 522; *Frederick v. United States*, No. 111-56, decided July 15, 1960; *Allin v. United States*, 147 Ct. Cl. 459; *Weiner v. United States*, 148 Ct. Cl. 445; *Siegel v. United States*, 148 Ct. Cl. 420. We see no adequate reason why the rule laid down by these (and other) cases should now be overturned. The decision of Retiring Boards and the Disability Review Board are not immune from scrutiny under the court's holdings, and there is insufficient indication in the statute creating the Correction Board—or the statute's legislative history—that an exception should now be made for the Correction Board (if suit is timely brought).

[21] For a discussion of the legislative history, see the Appendix to this opinion.

2. But it does not follow from the general existence of judicial review for Correction Board decisions that those decisions create a *new* substantive cause of action which has its own, *new*, limitations period. That a tribunal's rulings are subject to judicial review means that the administrative decision is open to scrutiny by a court, if a timely judicial proceeding is filed—not that the administrative tribunal's decision, in itself, becomes the new measure and the new beginning of the plaintiff's judicial rights. There is a profound difference between a legislature's providing for further review of a ruling on a cause of action and its creating a new and independent cause of action. District Court decisions are reviewable in the Courts of Appeals, but the appellant's cause of action is grounded on the various substantive statutes or other substantive federal law (or state law in diversity cases), not on the provisions of the Judicial Code establishing review of District Court cases by the Courts of Appeals or giving the District Courts jurisdiction of that type of case. Similarly with the administrative agencies. In court cases coming from the National Labor Relations Board or the Securites and Exchange Commission, for example, the individual seeking judicial relief places his claim on the substantive provisions of the National Labor Relations Act or the Securities Act, not on the provisions in those statutes for judicial review of agency proceedings. Judicial review and substantive claim are entirely separate concepts. The former is usually provided to see whether the latter is valid or has been properly enforced, but the establishment of review does not *ipso facto* create a new substantive claim.

In short, as applied to our problem, the existence of judicial review does not, in itself, supply any basis for asserting that the limitations period runs from the time of the Correction Board's decision. All that the existence of judicial review means is that the Board's decision will be reviewed, in a proper case, if a timely suit is brought. That

is what the House Committee meant, in part, when it said that the courts would not be precluded from reviewing Correction Board cases "under appropriate circumstances" (H. Rept. No. 449, 82d Cong., p. 3).

3. It may be said, however, that on this view it is quite possible that the six-year statute of limitations will have run before completion of the Correction Board proceeding, and therefore that there will be no judicial review of the Board's determination even if it is wholly arbitrary and review would be "appropriate" if suit were timely brought (cf. *Knight v. United States*, No. 64-60, decided Jan. 18, 1961, slip op., p. 2). This is a possibility, but there are, we think, three sufficient answers to the argument.

The first is that it is inherent in all statutes of limitations that claims otherwise justifiable and justiciable will be denied because suit is not brought in time.[22] Nor is it unique in federal law to have an administrative remedy immune from judicial review if a timely proceeding is not commenced. For example, the ten-year limitations statute for the General Accounting Office (31 U. S. C. 71a) means that many improper denials of claims by that office cannot be redressed in this court which is limited by the six-year statute—although those very claims could have been vindicated here if suit had been brought in time. Congress has certainly shown as much intention to have adverse rulings by the Accounting Office reviewed by this court as it has Correction Board decisions, but if suit is not brought within six years of the original claim such review cannot be had, no matter how erroneous the later Accounting Office ruling may be. See also *Cosmopolitan Manufacturing Co.*

[22] In cases coming before this court in which it has been held that the limitations bar is not tolled or deferred by resort to permissive administrative remedies (see text *supra*, Part I, B, 4), it is likewise true that arbitrary administrative action cannot be redressed if a timely suit is not begun. Those cases illustrate the principle that the mere existence of judicial review does not, in itself, insure that a suit can always be maintained.

v. United States, No. 168-60, Ct. Cl., and *Arlene Coats v. United States*, No. 123-60, Ct. Cl., decided Jan. 12, 1962, 297 F. 2d 546, *cert. denied* Oct. 8, 1962.

The second answer is that the plaintiff can bring suit and obtain judicial review within six years of his Retiring Board proceeding; he can then ask the court to suspend the judicial proceedings to allow resort to (or completion of) Correction Board proceedings (if it is desirable to have Correction Board review). See this suggestion in *Odell v. United States*, 134 Ct. Cl. 634, 645-6 (original opinion) and *Ogden v. Zuckert*, 298 F. 2d 312, 317 (C. A. D. C.). In that way there can be full completion of the administrative remedy, if that is appropriate.

Third, a claimant who has had a Retiring Board proceeding—or who is sufficiently aware of a possible disability that he requests a Retiring Board (and is turned down)—ordinarily has adequate notice of his potential entitlement to disability retirement pay so that he can and should bring suit within six years; he is not caught unawares by the sudden development of a latent or progressive condition that he reasonably thought non-disabling at the time of his separation. Such a claimant should be fully able to protect himself by bringing suit in time.[2]

B. *Exhaustion of administrative remedies.*

1. Another argument is that a Correction Board proceeding should be viewed as mandatory not permissive, and therefore as a necessary prerequisite to the accrual of a cause of action for disability retirement pay in this

[2] As for those claimants who did not have (or request) a Retiring Board (probably because they had no adequate idea they were or could be disabled) and who thereafter apply to the Correction Board, their single judicial cause of action does not accrue, under the court's decisions, until completion of the Correction Board proceedings (see *supra* and *infra*); thus, this group, too, is adequately protected against having too short a time in which to commence an action.

court.[25] The District of Columbia Circuit recently held in *Ogden v. Zuckert*, 298 F. 2d 312 (Dec. 1961), that exhaustion of Correction Board proceedings was not required—agreeing with this court's *Girault* decision (and those following it). Again we see no adequate reason to upset this applecart, at this late stage, by now declaring that exhaustion is necessary, and thus barring all those who, following this court's prior decisions, failed to apply to the Correction Board. In *Boyd v. Franke*, 297 F. 2d 17 (Nov. 1961), the Fourth Circuit did hold that exhaustion of administrative remedies was required before resort to the injunctive process, but that case involved a military discharge—and the Court of Appeals interpreted 10 U. S. C. 1553 as providing a mandatory remedy before the Discharge Review Board for servicemen dissatisfied with their discharges. The Correction Board was only incidentally involved, and the court did not hold the Correction Board proceedings (as distinguished from a proceeding before the Discharge Review Board) to be a required prerequisite. There is no conflict with *Ogden v. Zuckert*, *supra*.

2. Another facet of the exhaustion argument is that, even though resort to the Correction Board is permissive not mandatory, the cause of action does not accrue, if an application is made to the Board, until its final decision. Reliance is placed on *Keeney v. United States*, No. 11-58, Ct. Cl., decided June 8, 1960, discussed *supra*, in which the court declared that, although a veteran's appeal to the Civil Service Commission from adverse personnel action is permissive, still limitations does not run until the Commission's final decision. It is not at all clear, and we do not decide, that under *Keeney* the veteran's appellate

[25] This would require the overruling of *Girault v. United States*, 132 Ct. Cl. 135, 141, and the many other opinions holding that the cause of action accrues upon the final action of the Retiring Board and is not tolled by proceedings before the Disability Review Board or Correction Board. See *supra*.

remedy is truly permissive, but at any rate we shall not apply the *Accrues* rule, even if it be considered to be that a wholly permissive remedy tolls the statute, to disability retirement cases. Appeals to the Civil Service Commission on veterans' personnel matters must normally be taken within a short time after the adverse action by the employing agency. A six-year period from the agency's decision would almost never run before appeal had to be taken, and normally the appeal would be concluded in a few months. Accordingly, the employee is not in a position, by appealing, to postpone the final administrative decision for any lengthy period. On the other hand, until recently, review by the Correction Board or the Disability Review Board could be sought well after the end of the six year span and a claimant who had allowed the six-year limitations period to elapse could easily revive his judicial claim by applying to one or both of these Boards. The claimant could, in effect, pick his own time for suit; he could delay it for many years if he wished to do so, or he could bring it on at once if that was his desire. The long period for applying to the Correction and Disability Review Boards makes it inadvisable and inappropriate to carry over the suggested rule to the disability retirement area. The potentialities of delay and manipulation are too great.

b. Tucker Act. Still another contention is based on the Tucker Act (now 28 U.S.C. 1491) which gives this court jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." It is argued that, once the Correction Board has acted, the claim is founded upon the 1951 Act providing for Correction Boards to change military records to correct errors or remove in-

justices. But this is again to confound a procedural remedy with a substantive cause of action. In disability retirement cases the claimant's cause of action rests upon the retirement legislation (now 10 U. S. C. 1201, *et seq.*) which gives servicemen disabled in the course of active service the substantive right to disability retirement. The Correction Board statute merely provides one remedy for enforcing that right, just as the provisions for Retiring Boards and the Disability Review Board also provide administrative remedies. The Act of Congress upon which the claim is founded—in the sense of the Tucker Act—is the substantive retirement statute, not the provision for boards or other methods for implementing that right. As we have pointed out, in retirement cases the Correction Board is normally a reviewing agency to decide whether prior administrative action under the retirement legislation has been erroneous or unjust.

We have already noted the relevant analogies showing that the Correction Board statute is not the basis of the claim. The legislation upon which is founded a federal claim pursued in the District Courts is the substantive statute, not the provisions of Title 28 U.S.C. providing for jurisdiction in the District Courts; claims for relief before administrative agencies rest on various substantive provisions of law (such as the unfair labor practice section of the National Labor Relations Act), not on the provisions establishing the administrative tribunal or the procedure to pass upon the demands. If the Correction Board statute is the Act of Congress on which the claim is founded—thus commencing a new cause of action—there would be no reason why a refusal by the General Accounting Office, acting under its general power to pay and settle, to satisfy a claim between six and ten years after accrual (see 31 U.S.C. 71a) should not create a new judicial cause of action allowing six *more* years for suit in this court. That, of course, has never been the law (e. g.,

Marr v. United States, 123 Ct. Cl. 474, 479-480), *cert. denied*, 345 U. S. 956, but it would have to become the rule if the plaintiffs are right that the Correction Board statute of 1951 gives them a new cause of action because it provides that the Board shall review their claims and grant them if just. The 1951 Act is no different in kind from comparable federal statutes providing a remedy for rights founded on other legislation or other regulations. See, *e. g.*, *Cosmopolitan Manufacturing Co. v. United States*, No. 168-60, Ct. Cl., and *Arlene Coats v. United States*, No. 123-60, Ct. Cl., decided Jan. 12, 1962, 297 F. 2d 546, *cert. denied*, Oct. 8, 1962.

Moreover, if every Correction Board decision creates a new cause of action under the 1951 Act—a cause of action which is judicially cognizable—it would follow that every ruling of the Boards, not merely monetary cases (such as disability retirement claims) but all rulings on the manifold types of disciplinary and other questions coming before the Boards, would be reviewable in the courts of the District of Columbia by declaratory judgment action or suit for injunctive relief under 28 U. S. C. 1331 (federal question jurisdiction) and the pertinent provisions of the District of Columbia Code (Sections 11-305 and 11-306). We are not ready to accept the proposition that every non-monetary decision of the Board thus becomes reviewable even though the initial military action which is sought to be corrected before the Board would not be reviewable even if arbitrary—or that Congress so intended. The correct position, it seems to us, is that certain of the Board's decisions are judicially reviewable (if a timely suit is begun) and others may well not be reviewable. Where the underlying claim is of the reviewable type, review may be had, but the 1951 Act would not create reviewability where the nature of the claim precluded it.

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[2] E. g., performance grading of officers and enlisted men; minor disciplinary actions; recommendations for decorations, etc.; promotions; assignments, etc.; school grades.

D. *Other considerations.* Two other potent considerations argue against accepting the thesis that Correction Board action creates a new, independent, cause of action, upon which suit may be brought within six years.

1. The first is that it is unusual to have two or more causes of action stemming from the same events or transactions, but arising at wholly different times. Theoretically, it would not be impossible for Congress to make such provision, but in the absence of some definite legislative indication to that effect it is preferable to follow the normal principle that out of one set of facts and circumstances involving the claimant's separation from service there arises but one claim for the same kind of relief (money, in the case of disability retirement pay claims). This is all the more true since our limitations statute is phrased in terms of the "*first*" accrual of the claim. 28 U. S. C. 2501. The legislative emphasis on *first* accrual cautions against multiplication of monetary claims successively arising out of essentially the same facts.

The plaintiffs' theory would mean that a claimant might have three separate causes of action on which suit could be brought successively. He could sue immediately after the Retiring Board decision and if he lost at that time could appeal (in many cases) to the Disability Review Board and then file another suit and if he lost again could then proceed before the Correction Board and, losing there, file still another suit. These successive suits would not be subject to a defense of *res judicata* (since the claims would be different, under the theory of a "new cause of action") and might even avoid collateral estoppel on the basis of some new aspect of disability, etc. The claimant could thus have three separate and successive causes of action in this court, each with its own six-year limitations period.[26]

[26] The Disability Review Board cannot be distinguished from the Correction Board with respect to the creation of a new cause of action. What holds good for one holds good for the other.

2. Another reason for declining to recognize the Correction Board decision as starting a new six-year period is that most of these disability retirement cases involve an appraisal of the facts of the claimant's health when he left the service a considerable time before suit (usually in 1946-1948). In World War II cases, review by the Correction Board could be sought until October 1961; review by the Disability Review Board could be sought until fifteen years after release of retirement. Added to these long periods must be the significant factor that this court has been allowing the creation of full *de novo* records in disability retirement cases. As the court has pointed out (*Odell v. United States*, 134 Ct. Cl. 634, 645; *Gordon v. United States*, 134 Ct. Cl. 840, 843), ancient controversies, requiring the court to evaluate facts of the distant past, would be presented if claims were regularly allowed to wait until after the Correction Board or Disability Review Board proceedings. One of the prime objectives of the statute of limitations is to prevent factual issues from being tried too long after the events occurred—with witnesses dead or gone, records lost or destroyed, and memories confused or dimmed—at a time when the past cannot be reconstructed with any pretense of accuracy.

It is true, of course, that the same lengthy time can elapse where the Correction Board is the first Board to act (see *Proper v. United States*, 139 Ct. Cl. 511, and *Patterson v. United States*, 141 Ct. Cl. 435, discussed *supra*) as where the Correction Board is reviewing a Retiring Board's earlier decision. The answer is that Congress has deliberately given servicemen this lengthy period in which to apply to the Correction Board although no Retiring Board has been called or asked; in effect, Congress has allowed many servicemen a very long time in which to seek retirement pay and has not insisted that application be made at or upon release from service. We do not depart from our prior decisions embodying the principle

that the claim for disability retirement pay does not accrue until the final action of a proper board simply because we may possibly believe too long a time has elapsed or been allowed. But it is worth noting that in cases in which the lapse of time puts the Government at too great a disadvantage in its proof before the Correction Board (or in this court) a rejection of the claim by the Board may well not be arbitrary in view of the difficulties of proof due to the passage of the years.

The other side of the coin is that veterans who never applied for a Retiring Board because they did not know they were ill or did not appreciate the progressive or serious character of their disease or disability will not be cut off by limitations from pursuing their late-discovered claim before the Correction Board and this court. We cannot, of course, know the precise statistics but it seems probable that the class of those who never had or sought a Retiring Board and later applied to the Correction Board includes a large proportion of men whose disabilities were discovered or became aggravated after release. On the other hand, those servicemen who were sufficiently alerted to the possible existence of a disability to ask for or appear before a Retiring Board will properly be cut off after six years from that time; their request for (or appearance before) a Retiring Board would normally put them on adequate notice of the existence of their claim.

In discussing this double need to have the judicial determination of the facts take place at a moment not too far removed from the actual events and also to allow claimants an adequate (but not overly long) period to bring suit, we emphasize that we do not propose to make our rulings on these limitations issues turn on whether, in the particular case then before us, it would be easy or hard to reconstruct the facts accurately. Of course, the formulation of the general rules can and should take ac-

count of different recurring categories of factual situations; one reason, for instance, why we believe that the statute does not commence to run until Correction Board action where it is the first board, is that many or most of those will be cases where the serviceman did not know or appreciate his disability at the time of his release. But the reclassification is general and does not depend on such appraisal of the individual facts or the appeal of the particular case.

F. *Conclusions.* Our conclusion on *de novo* consideration is that the court has been correct in its implicit holding, in disability retirement pay cases, that a decision by the Correction Board does not create a *new* claim founded on the 1951 Correction Board legislation. But we also adhere to the holdings that, where a Retiring Board has not been had or requested, the claim based on the retirement legislation does not accrue until final denial by the Correction Board; in that event, the Correction Board action does not create a new claim but simply ripens or accrues the plaintiff's single claim.

We believe that the general rules set forth at the end of Part I, *supra*, which we now reaffirm, (a) accord with the trend of our time-bar rulings in disability retirement pay cases; (b) are in harmony with the main line of this court's prior limitations decisions in the pay field generally; (c) are in harmony with the general principles governing the statute of limitations; (d) are fair to the plaintiff in giving him adequate time to bring suit and to protect his rights in court; (e) are fair to the Government in that they follow established general principles and Congressional legislation, and would not normally allow too great a time to elapse between suit and the facts on which the claim is predicated; (f) do not depend upon an *ad hoc* evaluation whether the particular claimant deserves a chance to recover or not; and (g) are sufficiently

well defined for both court and counsel to follow. Moreover, we believe that neither plaintiffs nor the Government can properly complain that the court has unfairly hurt them by refusing to follow past rulings; the state of the prior decisions is such that neither side can correctly argue that it has been lulled into action or inaction by a series of prior decisions which we would now be refusing to follow.[27] On the contrary, as we have said, in our view the rules we affirm today conform well with the pattern fairly marked by our prior cases.

III. The present case

The present case is almost identical with the *Lipp* case which we today reapprove. The decedent was accorded a Retiring Board before his release from active service in January 1947. He died in 1958. Relief was not sought from the Correction Board (by his wife) until 1960, and this suit was begun in that year. The only problem is whether the 1946 Retiring Board's recommendation that the officer be reevaluated at the end of six months deprived its action (and his release from service) of the necessary finality so that no cause of action accrued until the denial by the Correction Board in 1960. Cf. *Suter v. United States*, 139 Ct. Cl. 466, 468, 469-70, 471; *Friedman v. United States*, 141 Ct. Cl. 239, 254-56; *Allin v. United States*, 147 Ct. Cl. 459-65, 471-72, 474-76; *Weiner v. United States*, 148 Ct. Cl. 445-50, 455, 460-61, 463-64. We do not think that is so in this case since the officer, after his release and prior to his death in 1958 (11 years after his release), did not make any effort to obtain the contemplated reevaluation. Whether or not Dr. Friedman made

[27] The *Knight* opinion denying a motion to dismiss, the only opinion to articulate the theory that a new cause of action arises from a Correction Board proceeding, was rendered on January 18, 1961, only a year-and-a-third before the *Lipp* decision.

a request for reevaluation in December 1946, before his final release from active duty on January 30, 1947,[28] it is undisputed that he did nothing further and there is no adequate excuse given for his doing nothing from 1947 to 1958. See War Department Circular No. 303, 9 Oct. 1946, par. 18*b* (requiring written application for reevaluation). In these circumstances, the cause of action accrued before 1954 (six years prior to suit) since he did nothing about his claim during the entire period from 1947 through 1953. In comparable cases in which the Retiring Board suggested later reevaluation and the court held that the Board's action was not final because of that recommendation, the officer made efforts within one, two, or three years to obtain the promised reevaluation; none delayed anywhere near as long as the officer in this case. See *Friedman v. United States*, 141 Ct. Cl. 239; *Allin v. United States*, 147 Ct. Cl. 459-65; *Weiner v. United States*, 148 Ct. Cl. 445.

Accordingly, we hold that this suit is wholly barred by limitations. Plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted. The petition will be dismissed.

DURFEE, *Judge*; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, *concur*.

APPENDIX

The legislative history is quite inconclusive with respect to preclusion of judicial review of Correction Board determinations.

1. The position that Congress affirmatively intended judicial review of Correction Board actions is founded upon (a) the deletion from the finality provision of the Correction Board statute (now 10 U.S.C. 1552, formerly 5

[28] If he did make such a request in December it was followed by his acceptance of unconditional separation in January.

U.S.C. 191a; Act of October 25, 1951, 65 Stat. 655) of any reference to the courts; (b) some colloquies at the House hearings at which certain Congressmen indicated their expectation that judicial review would be accorded; (c) the absence of any finality provision explicitly applying to the courts, and (d) the statement in the committee report that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances." See Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 Col. L. Rev. 917, 967-971 (Nov. 1957); *Friedman v. United States*, 141 Ct. Cl. 239; Madden, J., dissenting in *Haislip v. United States*, Nos. 442-59, 466-59, 439-59, decided Jan. 18, 1961, slip op., pp. 11-13; Brief of Reserve Officer Association, *amicus curiae*, in *Lipp* case, pp. 39-40. Taken together with the general principle normally favoring limited judicial scrutiny of administrative action,[29] these materials in the legislative history do furnish support for the view that all judicial review was not precluded. However, these materials go no further than to sustain the proposition that the types of Correction Boards rulings which are reviewable are those which would also be reviewable if made by other entities within the Defense Department. Correction Board proceedings would not render reviewable those substantive rulings which would otherwise be immune from review.

2. On the other hand, there are also indications in the legislative history pointing toward the conclusion that Correction Board decisions are not reviewable at all. *First*, it is clear that the Correction Boards were initially authorized in 1946 to provide an administrative substitute for the enactment of private bills for the correction of military or naval records; and such private laws were, of course, not reviewable by the courts (except for constitutionality); since the Correction Board stands in the place of such

[29] E. g., *Harmon v. Brucker*, 355 U. S. 579; *Leedom v. Kyne*, 358 U. S. 184; *Stark v. Wickard*, 321 U. S. 288.

private legislation it can be argued that Board action should be equally immune from judicial review. *Second*, the original finality clause, proposed for the 1951 amendment (the clause which initially provided that Board decisions "shall be final and conclusive * * * including review by the courts * * *", which was later modified to omit the reference to the courts) was introduced with reference only to subsection (b), the money settlement section, and not with reference to subsection (a), which was the general provision granting power to the Secretaries to make corrections to remedy injustice or error. From the House hearings there is ground for the view that the reason this finality provision was modified to delete all reference to the courts, and transferred from subsection (b) to subsection (a), was to make sure that the General Accounting Office (and this court) would not be precluded from passing on the monetary correctness of sums owing to a claimant as a result of a favorable decision by the Board, *i.e.*, a Board decision correcting a military record, in such a way that money would be owing the claimant. The General Accounting Office stressed its concern with compensation and not with the substantive aspects of a Board decision (see the dissent in *Haislip, supra*), and the changes in the finality clause appear to have been made (at least in part) to meet these objections. After these changes were made, there were statements in the course of a colloquy between Representative Vinson, the chairman of the full committee, and Representative Stuart, the spokesman for the subcommittee, which seem to say (without being explicit as to judicial review) that Congress intended the Secretary's authority to be final and conclusive except for computation of amounts (See I Hearings before the House Committee on Armed Services [No. 27] Full Committee Hearings on * * * H.R. 1181 * * *, 82d Cong., 1st Sess., pp. 600-601 (June 5, 1951)).

[1] I. e., the provision authorizing the services to make payments to servicemen whose records had been corrected in their favor.

This legislative history can be argued to define the "appropriate circumstances" (the term the Committee Report used, H. Rept. No. 449, 82d Cong., p. 3) which Congress envisaged for judicial review as being solely the question of the determination and computation of the *amounts* due as a result of a correction made by the Secretary. Once the Secretary has effected a correction which would entitle the applicant to recover money from the United States, under the Correction Board statute he cannot properly deny the applicant all the monies to which his entitlement has been established by or as the result of a Correction Board proceeding. These, it can be said, are the only "appropriate circumstances" for judicial review to which the legislative history had reference. The earlier colloquy at the hearings involving Congressmen Doyle and Clements—on which reliance has been placed (see *Friedman v. United States*, 141 Ct. Cl. 239, 257)[31]—can be said to represent only their own views and not the position of the subcommittee, or the full committee, let alone of the House or the Senate as a whole.

XI. Order of the court overruling plaintiff's motion for rehearing.

ORDER

These cases come before the court on motions for rehearings, reconsideration, new trials, or to amend judgments under Rules 53 and 54 of the rules of this court and, on consideration thereof,

[31] In this colloquy, the Congressmen seemed to indicate that they contemplated general court review of decisions of the Correction Board

It is ordered this eleventh day of January, 1963, that said motions are overruled as follows:

377-60 Betty Friedman, Executrix. Plaintiff's motion.

By the Court.

/s/ MARVIN JONES
Marvin Jones,
Chief Judge.

Appendix C—Statutes

1. *United States Code*, Title 5, §1009

§1009. Judicial Review of Agency Action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Proceedings.

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Acts Reviewable.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject

to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative or that an appeal to superior agency authority.

2. *United States Code*, Title 10, 1552

1552. Correction of Military Records: Claims Incident Thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error to remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

3. *United States Code*, Title 28, 2501

2501. Time for Filing Suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Appendix D—Plaintiffs in the Court Below Action on Whose Cases Has Been Suspended

Bainum v. United States, C. Cls. No. 318-60
Barnes v. United States, C. Cls. No. 330-61
Beckham v. United States, C. Cls. No. 379-61
Braun v. United States, C. Cls. No. 68-62
Burke v. United States, C. Cls. No. 29-62
Farrar v. United States, C. Cls. No. 190-61
Ferguson v. United States, C. Cls. No. 214-60
Haverstick v. United States, C. Cls. No. 17-60
Hellner v. United States, C. Cls. No. 15-60
Hoffman v. United States, C. Cls. No. 110-62
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Morris v. United States, C. Cls. No. 448-61
Moses v. United States, C. Cls. No. 191-60
Orzach v. United States, C. Cls. No. 280-59
Powers v. United States, C. Cls. No. 80-60
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Seidenburg v. United States, C. Cls. No. 126-62
Swartz v. United States, C. Cls. No. 322-55
Walters v. United States, C. Cls. No. 313-59
Woodard v. United States, C. Cls. No. 190-60

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1012

FRANK E. LIPP AND BETTY FRIEDMAN, EXECUTRIX OF THE ESTATE OF JOSEPH FRIEDMAN, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (*Lipp*, Pet. A1-A49; *Friedman*, Pet. A51-A92) are reported at 301 F. 2d 674 and 310 F. 2d 381.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner Lipp's claim was entered on April 4, 1962, and a motion for rehearing was denied on November

7, 1962. A subsequent motion for reconsideration was denied on January 11, 1963. The petition for a writ of certiorari was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

The judgment of the Court of Claims dismissing petitioner Friedman's claim was entered on November 7, 1962, and a motion for rehearing was denied on January 11, 1963. The petition for a writ of certiorari was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioners' claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suits were filed more than six years after the Secretary first denied applications for the disability determination and the benefits derived therefrom.

STATUTE INVOLVED

Title 28 of the United States Code, Section 2501, provides in pertinent part:

> Time for Filing Suit.
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners ask this Court to review decisions of the Court of Claims dismissing their suits to recover military disability retirement pay. In each case, the court below determined that the action was barred by the six year limitations period established by 28 U.S.C. 2501. The relevant facts are as follows:

Lipp. On January 26, 1946, having served as an Army medical officer throughout World War II, petitioner Lipp was released from active duty by reason of demobilization, not for physical disability (F. 1, Pet. A5-A6). He was honorably discharged from the Officers' Reserve Corps on December 12, 1952 (F. 1, Pet. A6). During his active military service, Dr. Lipp never sought examination for physical disability, nor did he request an appearance before an Army disposition board or a retiring board. At the time of his release from active duty, he thought himself to be in good health, physically fit to perform his duties (F. 12, Pet. A10).

By letter dated December 19, 1948, Dr. Lipp informed the Adjutant General that he was receiving a pension from the Veterans' Administration for multiple sclerosis and requested an appearance before a "medical retirement Board." On December 30, 1948, the Adjutant General replied that no retiring board would be convened unless Dr. Lipp presented evidence tending to show that, when released, he was suffering from a physical defect, related to his military service, which permanently incapacitated him

for active military duty (F. 23, Pet. A17-A18). On May 26, 1949, Dr. Lipp again requested an Army retiring board (F. 24, Pet. A18). Upon the Surgeon General's unfavorable recommendation (F. 24, Pet. A18), the Adjutant General on July 18, 1949, denied the request (F. 24, Pet. A18-A19). Dr. Lipp renewed his request on June 16, 1950, and, on July 13, 1950, it was again denied (F. 25, Pet. A19). Thereafter, on December 1, 1951, he applied to the Army Board for Correction of Military Records for a correction of his records to show "Disability retirement for Service connected diagnosis of Multiple Sclerosis" (F. 26, Pet. A19). On October 10, 1952, at the request of the Board, the Adjutant General informed him that the evidence presented failed to establish sufficient basis for a hearing and that, in the absence of additional evidence, no further action on the application was contemplated (F. 26, Pet. A20).

On March 15, 1954, Dr. Lipp filed a second application with the Correction Board, enclosing additional evidence with respect to his alleged disability [1] (F. 27, Pet. A21-A22). After a hearing, the Correction Board, concurring in the Surgeon General's opinion that the multiple sclerosis had antedated Dr. Lipp's military service, recommended denial of his application on October 31, 1955 (F. 28, Pet. A28-

[1] For the evidence with respect to petitioner's disability, not here at issue, see F. 5, Pet. A7; F. 6, Pet. A7- A8; F. 7, Pet. A8; F. 18, Pet. A12; F. 19, Pet. A13- A15; F. 28, Pet. A23- A28.

A30). The application was finally denied by the Assistant Secretary of the Army on November 17, 1955 (F. 29, Pet. A30).

Dr. Lipp filed his petition in the Court of Claims on August 22, 1958 (Pet. A5) asserting the alleged arbitrary and capricious action of the Correction Board in 1955 (Pet. A1, A2). The court held that, more than six years having elapsed between the denials of his requests for appearance before an Army retiring board and the filing of suit, the claim was barred by the statute of limitations (Pet. A4-A5). A motion for rehearing was denied on November 7, 1962 (Pet. A50). A subsequent motion for reconsideration, filed after the decision in *Friedman*, was denied on January 11, 1963 (Pet. A50).

Friedman.[2] Petitioner's testator, Dr. Joseph Friedman, served on active duty as an Army medical officer from January 9, 1941, to January 30, 1947. During this time, Dr. Friedman suffered periodic, serious illnesses with resultant hospitalization. During the years 1944-1946 a series of boards evaluated his capacity for continued service, the last of which, a retiring board, on October 25, 1946, concluded that he was not permanently incapacitated for active service. However, the retiring board recommended that Dr. Friedman be placed on temporary, limited duty for a period not to exceed six months after which reexamination and reevaluation were to take place. This was not done and he was

[2] The *Friedman* case was decided on cross motions for summary judgment. The facts are taken from the court's opinion (Pet. A51- A52) and are not in dispute.

released, at his own request, on January 30, 1947, not for physical disability.

After his separation in January, 1947, Dr. Friedman made no request of the Army and did nothing further to obtain disability retirement pay during the remainder of his life.[3] He died on October 4, 1958. Thereafter, on March 18, 1960, petitioner applied to the Board for Correction of Military Records for a determination that Dr. Friedman had been entitled to disability retired pay when he was released from active duty in January, 1947. This application was denied on August 17, 1960.

On September 30, 1960, petitioner filed a petition in the Court of Claims suing for the disability retirement pay alleged to have been arbitrarily denied Dr. Friedman. Ruling on cross motions for summary judgment, the court concluded that, the cause of action having accrued upon the determination by the retiring board in 1946, the suit was barred by the six-year limitation prescribed by 28 U.S.C. 2501 (Pet. A88-A89). A motion for rehearing was denied on January 11, 1963 (Pet. A93).

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[3] It was asserted below that in December, 1946, in response to an official request for an indication from him of his preference between temporary, limited duty and immediate separation, Dr. Friedman wrote to Walter Reed Hospital asking that he be recalled to active duty at the end of the six months for reexamination and reevaluation. This assertion was disputed. While purported copies were produced from Dr. Friedman's office, neither the Walter Reed files nor those of the Adjutant General's Office contained any such communication.

ARGUMENT

In holding the present suits barred by the six-year limitation prescribed by 28 U.S.C. 2501 the court below correctly applied settled principles of law to the circumstances of each case. The rulings do not conflict with decisions of this or any other court. Accordingly, no question is presented meriting review by this Court.[4]

The allegation that the decisions in these cases radically depart from the otherwise settled jurisprudence of the Court of Claims is particularly inappropriate in the face of the careful and unanimous opinion in *Friedman* which painstakingly examines each of the prior decisions and distills from that body of precedent the rule applied here. Contrary to petitioner's claim, the court has *not*, in these cases, upset the settled principle that the statute of limitations begins to run from the time of arbitrary action by the Service, rather than from the date of separation.[5] The rule stated is simply that the cause accrues upon

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[4] Insofar as it relates to the petitioner Lipp, the petition, filed more than 90 days after denial of the first motion for rehearing, is probably untimely. See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498. The subsequent motion for reconsideration was expressly filed under Rule 54(b) of the Rules of the Court of Claims which, by its own terms, does not affect the finality of the judgment.

[5] Normally, as here, entitlement to disability retirement benefits is administratively determined *before* separation. Since the right depends upon ability to perform military duties at that time, it would be reasonable to hold that the judicial cause accrues, at the latest, upon separation and that a suit for retirement disability benefits must be filed within six

the Secretary's *first* definitive action denying relief. Nor has the court held, as petitioners contend, that the action of a Correction Board is never reviewable, or even that denial of relief by such a board is never the first definitive action which matures the judicial claim. On this point, the decisions below simply hold that an application to the Correction Board does not toll the statute of limitations when the Service has already finally rejected a disability claim. The limitations rule is fully stated in the *Friedman* opinion (Pet. A74-A75):

> *Summary*: As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:
>
> (*a*). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).
>
> (*b*). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).
>
> (*c*). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopen-

---

years thereafter. Indeed, the government so urged in *Harper* v. *United States*, 310 F.2d 405 (Ct. Cl.). But, quite obviously, such a rule would not avail the present petitioners.

ing, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(*d*). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(*e*). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(*f*). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

There is in this nothing new. Undoubtedly, the limitations principles are now stated with rare clarity and completeness, but the result is in harmony with the main body of decisions by the Court of Claims. The present rulings implement the recognized principle that, while the judicial claim arises only when the appropriate Secretary acts arbitrarily (*Furlong* v. *United States*, 138 Ct. Cl. 843), the underlying right to disability retirement benefits [6] sup-

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[6] Act of April 3, 1939, §5, 53 Stat. 557, as amended, 10 U.S.C. (1946 ed.) 456; R.S. §§1245-53, 10 U.S.C. (1946 ed.) 931, 933-34, 961-66. R.S. §§ 1245, 1251-53, were repealed by

ports no more than one cause of action, which "first accrues" (28 U.S.C. 2501) when the right is, for the first time, finally denied by administrative action. Whether the Secretary first acts through a Retiring Board, a Disability Review Board, or a Correction Board, or by refusing to convene one of these boards, depends on the particular circumstances of each case.[7] But, whatever the means, once he has finally denied the claim, his action becomes judicially reviewable, and while further administrative consideration may be available, it is neither necessary to seek it (*Ogden* v. *Zuckert*, 298 F.2d 312 (C.A.D.C.)), nor will the subsequent application toll the statute of limitations.

Plainly, there is no occasion to review the principles announced in the decisions complained of. Nor is there reason to question their application here. In *Lipp* the Army had finally rejected the disability claim on July 18, 1949, by refusing to convene a Retiring Board, more than nine years before the suit was filed. In *Friedman* a Retiring Board denied the claim on October 25, 1946, more than fourteen years

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the Act of October 12, 1949, §531(b), 63 Stat. 838, and replaced by §§401-15, 63 Stat. 816-25, 37 U.S.C. (1952 ed.) 271-85. When Title 10 of the Code was revised, and enacted into law in 1956, these provisions were repealed, Act of August 10, 1956, § 53, 70A Stat. 641, and were replaced by the present 10 U.S.C. 1201-21, as amended.

[7] See *e.g.*, *Harper* v. *United States*, *supra*, where the disability claim was first finally rejected by the Correction Board and the court held a suit filed within six years thereafter timely.

before the suit was filed.[8] Having failed to seek timely judicial review of the administrative action, both petitioners were properly held barred by limitations when they ultimately sought relief in the Court of Claims.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
DAVID J. MCCARTHY, JR.,
Attorneys.

MAY 1963

[8] The Board's rejection of the claim became final, at the latest, when Dr. Friedman, without excuse, failed to request reexamination and reevaluation within six months, as suggested by the board.

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